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Issue Date: 23 March 2004

In the Matter of:
RUNGVICHIT YONGMAHAPAKORN (RUNG)
Prosecuting Party

v. 2004-LCA-00006

AMTEL GROUP OF FLORIDA, INC.
Respondent

Decision and Order

This case comes before me pursuant to the Immigration and Nationality Act of 1952 ("INA" or "the Act"), as amended by the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), and 1184(c), and implementing regulations found at 20 CFR Part 655, subparts H and I. The H-1B program is a voluntary program which allows employers to employ nonimmigrant aliens admitted to the United States under H-1B visas to fill specialized jobs not filled by American workers.[1] The H-1B category is designed for foreign professional workers holding a university degree, and it authorizes the foreign professional to work in the U.S. in a "specialty occupation."[2] These workers are issued H-1B visas by the Department of State upon approval by the United States Citizenship and Immigration Services ("USCIS", formerly the Immigration and Naturalization Service, "INS"). 20 CFR § 655.705(b). Examples of "specialty occupations" include accountants, attorneys, information technology professionals, journalists and pharmacists. In most cases, the H-1B category allows for a maximum period of stay in the United States of six years.[3] Should the company desire to employ the H-1B worker for a longer period of time, a permanent resident petition may need to be filed.

A hearing was held in Ft. Lauderdale, Florida on December 22, 2003. The Prosecuting Party, Rungvichit Yongmahapakorn (Rung) ("Prosecuting Party" or "Complainant") is *pro se*. She had been advised that she had a right to be represented by an attorney or other qualified representative, but did not obtain one. She appeared and testified by telephone, from Bangkok, Thailand, upon the agreement of the parties.[4] The Respondent, Amtel Group of Florida, Inc. ("Amtel"), was represented by John M. Hament, Esquire, Kunkel, Miller and Hament, Sarasota, Florida. The Administrator, United States. Department of Labor, Wage and Hour Division, was

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[1] 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n) and 1184(c).
[2] Immigration Act of 1990, Pub. L. No. 101-649; 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 CFR § 655.700.
[3] 8 C.F.R. § 214.2(h)(13)(iii). *But see* American Competitiveness in the 21st Century Act (AC21), Pub. L. No. 106-313 (Oct. 17, 2000).
[4] She initially had requested that the Respondent provide transportation and living expenses to attend the hearing from outside the United States, but my authority to order it is now moot.

represented by Thomas C. Shanahan, Esquire, Office of the Solicitor, Department of Labor ("DOL"), Atlanta, Georgia.

In a pre-hearing telephone conference and by pleading, the Complainant objected to the participation of Mr. Hament as Respondent's attorney, asserting that he did not have legal authority to act in this proceeding.[5] I note that the Complainant had listed him as a witness, but did not call him. As the Complainant did not establish any evidence as a basis for his removal, I denied this objection.

During the hearing, the Administrator offered twenty eight (28) documents as exhibits. Because there may have been a discrepancy between the documents that had been provided to Complainant prior to hearing,[6] I left the record open for ten days to give her an opportunity to examine the records that had been submitted to her and to make an objection. Ten days has long since passed and no objection was tendered, and therefore Administrator Exhibits ("AX") 1 through AX 28 are admitted into evidence. *See* Transcript ("Tr") at 15. The Prosecuting Party offered thirty three (33) exhibits into evidence. These were admitted as Ex "A" through Ex "GG".[7] The Respondent offered fourteen exhibits, which were entered as "RX" 1 through RX 14. After the hearing, the record remained open to permit the Prosecuting Party to submit documents to which she had referred in her testimony.

John Norris testified on behalf of the Administrator. Kevin Matney, General Manager of Ramada Inn owned by Respondent, testified on behalf of Respondent. Complainant also testified.

At the close of her testimony, the Prosecuting Party made a speaking motion to remand the case for further investigation. As the case had been noticed and no exigent circumstance or surprise evidence had surfaced, and as the Complainant had ample opportunity to request remand prior to hearing, and as the logistics of the hearing were an accommodation to her, the motion was denied. Tr. 108.

After the hearing, I left the record open to permit the Prosecuting Party to submit other documents to which she had referred, subject to review and objection by her opponents. She submitted Ex HH through Ex PP. No objection has been made.[8] Therefore, the documents are admitted into evidence.

Attached to a letter dated December 19, 2003, the claimant submitted a letter from Suwalee Thangsumphant dated November 24, 2003 and a letter from Kathy Keough, dated December 26,1995.[9] In a telephone post-hearing conference on February 19, 2004, I noted that these documents, marked as "ALJ 1" and ALJ 2, had been sent prior to hearing but were not

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[5] See also Tr., 142.

[6] Her copy had listed thirty (30) AX exhibits.

[7] The Respondent objected to the admission of Ex N, the 1999 LCA, and Ex EE and FF, the severance documents. The Administrator took no position on these documents. They were part of the pre-hearing submissions sent to the parties and were relevant as to impeachment of Mr. Norris and were referenced by the Complainant as evidence regarding whether she is a vice president or internal auditor, and goes to motive, state of mind and intent at the time of termination. Therefore, they were admitted. In the transcript, although the record uses the term "accrual," I actually stated the term, "parol" evidence. Tr., 95 – 96. Both the Respondent and the Administrator objected to Ex GG as a self serving document. It was admitted for the limited purpose of explaining what the Prosecuting Party's position was on the issues.

[8] There had been some question whether the documents had been received by all of the parties, but in the telephone conference February 19, 2004, they acknowledged that they had been received within the ten day post-hearing period.

[9] I did not have that document at time of hearing. I was in transit to the hearing when it was sent and when it was received by my office. It was not forwarded to me and not incorporated into the file until after the hearing.

identified at the hearing. The Administrator had no objection to their admission. I left the record open to give the Respondent an opportunity to comment. *See* Transcript of the February 19, 2004 Telephone Post-Hearing Conference (hereinafter "Tr. II"). The Respondent objected on the basis of hearsay and relevancy. The objection is denied and the documents are admitted.

On or about February 23, 2004, the Complainant submitted Ex RR through VV that identify incidental expenses of $9,633.85, which she alleges were incurred during the pendency of the claim. Both the Respondent and Administrator object on the basis that the documents are late, self-serving, and irrelevant. I accept that these exhibits were not timely filed, and exclude them from the record and from consideration.

The Respondent also submitted RX 15 and RX 16 on or about February 23, 2004. These relate to the submission of a check to satisfy the Administrator's decision that Respondent pay Complainant $1000.79, and the admission that Respondent failed to insure Complainant for health insurance benefits for the month of May, 2003. As there is no viable objection, these are admitted into the record.

Law and Regulations

An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the U.S. Department of Labor ("DOL") by filing a Labor Condition Application ("LCA") before the worker is given an H-1B visa. 8 U.S.C. § 1182(n). An LCA filed by an employer must set forth, *inter alia*, the wage rate and working conditions for the H-1B employee. 8 U.S.C. § 1182(n)(1)(D); 20 CFR §§ 655.731 and 655.732. Upon certification of the LCA by DOL, the employer is required to pay the wage and implement the working conditions set forth in the LCA. 8 U.S.C. § 1182(n)(2). These include hours, shifts, vacation periods, and fringe benefits. *Id*.

According to the regulations, "DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application." 20 CFR § 655.740(c). Upon certification of an LCA, the regulations impose on the employer the responsibility of developing and maintaining "sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its labor condition application and the accuracy of information provided in the event that such statement or information is challenged." 20 CFR § 655.710(c)(4).

The Act defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes under various types of visas. 8 U.S.C. Sec. 1101(a)(15). One class of aliens, known as "H-1B" workers, is allowed entry to the United States on a temporary basis to work in "specialty occupations." 8 U.S.C. Sec. 1101(a)(15)(H)(i)(B); 20 C.F.R. Sec. 655.700. An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the U.S. Department of Labor ("Department") by filing an LCA before the alien is given an H-1B visa by the Department of State.

20 C.F.R. § 655.805(a)(13), sets forth that discrimination against an employee for protected conduct is an H-1B violation. Section 655.801(a) defines "protected conduct":

> No employer . . . shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee because the employee has . . . disclosed information to the employer, or to any other person, that the employee reasonably

believes evidences a violation of section 212(n) of the INA or any regulation relating to section 212(n), including this subpart I and subpart H of this part . . . ."

INA Section 212(n) sets forth in pertinent part:

> (viii) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an application under this subsection to fail to offer to an H-1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.

The methodology of enforcement of the law is similar to the employee protection provisions contained in the nuclear and environmental whistleblower statutes administered by DOL,[10] and the same analysis applies. 20 CFR § 655.801(a)(2002). *See* 65 Fed. Reg. 80178 (2000) ("The Department is of the view that Congress intended that the Department, in interpreting and applying this provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (See 29 CFR Part 24);" See ***Administrator v. IHS Inc***., USDOL/OALJ Reporter (HTML), ALJ No. 1993-ARN-1 at 74 (ALJ Mar. 18, 1996).

The Department's Investigation

On July 23, 2003, the Prosecuting Party filed a claim alleging that she had been underpaid for her work under an LCA. AX 19. She alleged the following:

> In April, 1993 Amtel Group of Florida, Inc. was incorporated as a Florida corporation located at 2500 Edwards Drive , Lee County, Fort Myers , Florida 33901. Currently , it runs a hotel business named "Ramada at Amtel Marina" which also located at the same place and employs about 65 to 90 people.
>
> On Dec. 19, 1998 the Complainant was rehired as an Auditor for Amtel Group of Florida, Inc. by Chairman Chavalit Thangsumphant.
>
> During Dec. 19, 1998 to Feb. 29, 2000 the Complainant received her salary from Bangkok Office.
>
> On April 5, 1999 Chairman Chavalit Thangsumphant appointed the Complainant as a Vice President for Accounting and Finance.
>
> From Apr 5, 1999 to May 30, 2003 the Complainant worked for Amtel Group of Florida, Inc. in the areas mentioned below "without supervising any worker and without authorization to hire and terminate any employee".
>
> - accounting functions for Amtel group of Florida, Inc., Amtel Farm, Inc., Amtel FleaMarket Mall , Cattle Pen Corporation , Amtel Mall, Inc.
> - accounts receivable functions for Amtel Group of Florida, Inc., Amtel Farm, Inc. , Amtel FleaMarket Mall , Amtel Mall, Inc.
> - accounts payable functions for Amtel Group of Florida, Inc., Amtel Farm, Inc. , Amtel FleaMarket Mall , Amtel Mall, Inc., Cattle Pen Corporation.
> - audit functions.

[10] 8 U.S.C. § 1182(n)(2)(C)(iv).

- administrative and secretarial work,
- assisting some of Ramada at Amtel Marina's financial and accounting work as well as resolving some of its problems.
- providing some advice and consultant to the top management as well as did some research for the top management
- running some personal errands for the "top" management,
- work on Estate of Mr. Chavalit Thangsumphant.

Complainant also alleges that in 1999, the company's immigration attorney Mr. Robert Thomas Maher, informed the company that the acceptable annual prevailing wage for the position of vice president was $ 60,000.00.

She alleged further:

However, the company applied for a H-lB visa for the Complainant under the position of "Internal Auditor" where the annual wage rate approved by U.S. Labor Department was $ 49,500.00, "in order to underpay Ms. Rungvichit $ 10,600.00 per year. (or about $ 40.77 per day). As of a matter of fact, the company actually paid her only $49,400.00 per year, not $ 49,500.00 per year."

On Jan. 18 , 2000 U.S. Immigration and Naturalization 'Service granted the Hl-B1 petition filed by Amtel Group of Florida, Inc. for the period of Jan. 18 , 2000 to Nov. 28 , 2002.

From March 1, 2000 to May 30, 2003 the Complainant was under the payroll of Amtel Group of Florida, Inc. at the pay rate of $ 49,400.00 per year.

She also alleges that during October 9, 2000 to May 21, 2002, Respondent intentionally avoided paying her the approved wage rate for the position of "Internal Auditor" by requiring her to sign a Rental Agreement and pay a room rental of $251.86 every two weeks "in spite of its promise to provide her free accommodation for the whole period of her employment". She alleges that during that period she had paid the company the room rental for 43 times which totaled $10,829.98.

On Aug. 27, 2002, Ms. Suwalee Thangsumphant, the President at that time, signed the H-lB application form (Form 1-129 and Supplement) for the Complainant under the position of "Internal auditor" at the wage rate of $ 49,500 per year with the agreement to follow the labor condition application and to pay the costs of return transportation if the company dismissed Prosecuting Party before the end of the period of authorized stay.

Starting January 1, 2003, Amtel Group of Florida, Inc. offered Aetna's health insurance plan for the year 2003 to its employees where the company pays 75 % of the insurance premium and each participating employee pays 25 % of the premium by allowing the company to deduct $ 34.07 from the bi-weekly payroll check. The Complainant participated in this health insurance plan.

On March 12, 2003, U.S. Immigration and Naturalization Service sent an Approval Notice of Prosecuting Party's H1-B petition filed by the company to extend her employment in the position of an Internal Auditor for the period of Nov. 29, 2002 to Nov. 28, 2004. About at end of April, 2003, Ms. Chavanuch, the company's Director and President, had signed Complainant's Personnel Change Form (PCF) to approve her taking 14 working days vacation covering the period of May 10-June 1, 2003.

On May 9, 2003 Ms. Chavanuch Thangsumphant signed a letter addressing to U.S. Consul General of the United States located at Bangkok, Thailand in order to

request the Consular official to extend Complainant's H1-B non-immigrant visa for the petition approval period which is Nov. 29, 2002 to Nov. 28, 2004.

On May 9, 2003 Ms.Chavanuch Thangsumphant signed a letter addressed to USCIS at in order to request the USCIS official to grant Complainant's approval (I-94) for the period of the petition approval, which is to Nov. 28, 2004.

On May 10, 2003 the Prosecuting Party left Fort Myers for Bangkok.

May 21, 2003 U.S. consular official in Bangkok issued and stamped a H1-B visa on Complainant's Thai passport, with an expiration date is Nov. 28, 2004.

On May 30 , 2003 Ms. Chavanuch Thangsumphant, Director, issued the following Memorandum to all employees under the subject " Termination of Ms. Rungvichit 'Rung' Yongmahapakorn" and posted it in the Hotel's public area.

> Effective on May 30 , 2003 Ms. Rung has been terminated from employment with Amtel Group of Florida, Inc. Please be advised that she may ONLY return on Sunday, June 1 , 2003 until the evening of June 2 , 2003, to collect her personal belongings and will be considered a trespasser shall she return afterwards. Employees seeing Ms. Rung on premise without an escort by security or management shall contact any supervisor or department head immediately. Supervisors and Department Heads shall contact our General Manager, Kevin Matney, or security supervisor, James Denny, immediately. Thank you for your immediate attention and cooperation in this matter.

On Jun. 1, 2003 (Bangkok time) the Prosecuting Party left Bangkok for Fort Myers.

On June 1, 2003 (U.S. time) the Prosecuting Party arrived in Detroit. The U.S. Immigration Service at Detroit granted her 1-94 approval with an expiration date of Nov. 28, 2004.

On Jun. 2, 2003 at about 1:15 a.m. (U.S. time) Complainant arrived at the Ramada at Amtel Marina and saw the following "Condition of Separation" Memorandum posted in front of room number 411, where she was staying, and also in the Hotel's public area. Mr. Chai Thangsumphant and Ms. Chavanuch Thangsumphant were named as the issuers of the Memorandum but they didn't sign the Memorandum.

> Effective May 30, 2003 , you have been let go from Amtel Group of Florida, Inc. Outlined here are the conditions following your separation:
>
> 1.) Amtel Group of Florida, Inc. will grant you a place to stay for the night of June 1, 2003 until 3 pm of June 2, 2003. At which time you will collect all your personal belongings and pack them in your suitcase or box. You will be escorted by security to your office to pack up your personal belongings only.
>
> 2.) You may take whatever you can with you. The rest of your stuff will be shipped to you if you choose.
>
> 3.) Please meet with representatives of Amtel Group of Florida, Inc. at 9 am in the Human Resources office to receive your separation agreement between you and Amtel Group of Florida, Inc. At that time you must return all property belonging to the Company, which may be in your possession, including, but not limited to, the following : Keys and or handbooks.
>
> 4.) You will also receive a check compensating you for your work and any benefits due up to the date of termination, May 30, 2003.

The Complainant also alleged that upon terminating the Prosecuting Party's job, Amtel Group of Florida, Inc. failed to apply a system of progressive discipline, as specified in its Employee Handbook, consistently, properly, fairly, and without discrimination. "Such discharge was arbitrary, capricious, and lacking in just cause."

On June 2, 2003 Complainant received a bi-weekly payroll check from Ms. Carol-Anne Bailey, a Human Resource staff worker of Amtel Group of Florida, Inc., for the payroll period of April 28-May 11, 2003, which showed a deduction of $ 34.07 for a medical insurance premium. "Normally most employees who are terminated immediately will get their last payroll check including accrued unused vacation and benefits on the day they are told about termination. Some of them will get their last payroll check on the regular pay day." Id.

On June 2, 2003, Amtel Group of Florida, Inc. directed Aetna to terminate the Prosecuting Party's health insurance plan effective from May 1, 2003 without asking for Complainant's approval and in spite of the fact that the company had deducted medical insurance premium from her payroll checks until May 25, 2003.

On Jun. 3, 2003 Complainant received a bi-weekly payroll check from Mr. Morton A. Goldberg, a Business Consultant staff of Amtel Group of Florida, Inc. for the payroll period of May 12 to 25, 2003, which deducted $ 34.07 medical insurance premium. Mr. Goldberg informed the Complainant that this was her last payroll check as referred in the revised Separation Agreement prepared by the company's labor attorney Mr. John Hament. But the Complainant argued that the check covered only the payroll period ending as of May 25, 2003, not May 30, 2003.

On Jul. 2, 2003, the Prosecuting Party received a Certification of Prior Group Health Plan Coverage from Aetna via mail informing her that her health insurance coverage stopped on Apr. 30 , 2003.

Respondent had terminated Complainant's health insurance effective May 1, 2003. The company continued to deduct health insurance premiums from her payroll checks. The average insurance premium for the period of May 1 to 25, 2003, was $60.80.

The record shows that the Complainant was paid $48,787.96 in salary for 2002 and $48,503.26 for 2002. RX 1.

The Department of Labor, Wage and Hour Division ("WHD") conducted an investigation of Amtel Group of Florida, Inc. Based on evidence obtained during the investigation, WHD determined that Respondent failed to offer equal benefits or equal eligibility for benefits or both in violation of 20 C.F.R. § 655.731(c)(3) and 20 C.F.R. § 655.805(a)(2). WHD determined that Respondent owed Prosecuting Party $1,000.79 in back wages, representing paid vacation for the dates May 26, 2003 through May 30, 2003. *See* AX-3. WHD issued its findings in a determination letter dated October 29, 2003. *Id*. Respondent did not contest the findings. Respondent submitted a cashier's check dated November 13, 2003, for back wages, less applicable withholdings, to the Prosecuting Party. Respondent provided to WHD proof of delivery of the check via Federal Express to Prosecuting Party at an address in Bangkok, Thailand.

The Complainant filed a timely request for hearing in response to the Administrator's determination letter.[11] The Respondent did not object to the Administrator's findings.

[11] The request for hearing states:

Initial Facts

The record shows that the Respondent hired the Complainant prior to the effective dates of the LCAs before me. The Respondent certified to the fact that she was an internal auditor. AX 1, AX 2, RX 2, RX 3, RX 4. The Respondent is a multinational company with a hotel property and real estate development and agricultural interests. Amtel Group of Florida Inc. apparently is a subsidiary of the parent corporation. At the time the LCAs were issued, the president of the company was Suwalee Thangsumphant. *See* LCAs, *Id*. The Chairman of the company was Chavalit Thangsumphant, who passed away during the tenure of the second LCA, and the new Chairman, Chai Thangsumphant,[12] terminated the Complainant's job. AX-26, TR., Ex GG.

Internal Auditor vs. Vice President

The LCAs provided to Mr. Norris identified the position of internal auditor. Tr. at 20-21, AX 1 and AX 2. However, the Prosecuting Party alleges that she is entitled to be paid at the rate for a corporate vice president.

The job description set out on a "Form I-129" supplement form dated August 27, 2002, signed by Suwalee Thangsumphant, President, stated:

> Review financial reports and inventory records and property looking for fraud, errors, waste and adequacy of accounting and inventory systems and personnel's compliance with system recordkeeping requirements. Issue reports to management with recommendations.

AX 4; AX 8, p. 3;Ex B. The record shows that the Respondent completed a similar form dated October 11, 1999. AX 12. A later application prepared by the Respondent lists the Complainant's education as an M.B.A. from the University of Arkansas in 1985. Ex L; AX 4, p. 20.

The Internal auditor position generates a prevailing rate of $52.041.00 per year. Tr., at 21, AX 1 and AX 2. It also reflects a rate of pay at $49,500.00 per year. *Id*. at 22; AX 1 and AX 2. The LCA covers the period from November 29, 2002 through November 28, 2004. Id. Mr. Matney, for Respondent, testified that Complainant was paid at a salary of $49,400.00 per year for the period 2002 to 2003. Tr., 145-146. *See also* RX 1.

The Prosecuting Party denies that she was paid at the rate of either a vice president or an internal auditor, and asserts that she was instead paid at a lower rate. Tr., 124. In her testimony, she essentially incorporated by reference all of the claims she had made in her July 23, 2003 letter. Tr., 85, AX-19.

- Didn't cover all the back wages / benefits, unreimbursed expenses, costs of return transportation, underpayment for my position, overcharged health insurance premium, compensation for work for Estate of ex-Chaiman [sic] who passed away on Jul. 7, 2001.
- limited the authority and service of DOL to only a small part of my issues. DOL should help resolving the issues between employers and employees as well as enforce the employers to treat employees fairly instead of limiting its scope of work only to a part c~f regulations specified in The Labor Condition of Application for H-lB.
- didn't based [sic] on the general practice of Amtel Group of Florida, Inc. (Amtel) in paying payroll / earned vacation for terminated employees, offering fringe benefits and special allowance to employees.
- Didn't based [sic] on the communication with Amtel's authorized representative during the whole investigation process.

[12] With cosignatory Chavanuch Thangsumphant, Director.

In testimony, Mr. Norris identified a prevailing wage rate determination of $1,000.80 per week prepared by the Florida Department of Labor Employment Service. *Id*. 22-24; *See* AX 10.[13] He testified that he did not have any reason to question the source and the amount of the prevailing wage reflected in the LCAs. *Id*. at 24. The Prosecuting Party does not allege that the computations by the Florida Department of Labor and Employment service are incorrect. *See e.g.* Tr., 124-126.

The record shows that the Respondent requested certification at "Skill Level II." AX 10.

The record also includes a memorandum signed by Chavalit Thangsumphant, Chairman of Respondent, dated April 5, 1999, that lists the Complainant as Vice President - Accounting and Finance." Ex C; AX 4, p. 7.

He also stated that the Respondent had petitioned for approval of the LCAs and petitioned for visas at the same rates of pay for the Prosecuting Party, which were approved by DOL, covering the same time period. *Id*. 26-27. Mr. Norris was not presented with any other LCAs. *Id*. at 28.

Upon investigation, Mr. Norris determined that the Prosecuting Party did not have the authority to hire and fire employees, and that these are crucial elements to determine her true job status. *Id*. at 31. He concluded that she was an internal auditor rather than a vice president. *Id*. at 32.

However, on cross examination by the Complainant, Mr. Norris was directed to a third LCA that had been approved May 1, 1999. TR., 52 - 55; Ex N. He testified that he had never seen that document prior to hearing. Tr., 54. The document shows that a vice president position was approved for the Respondent for the period April 1, 1999[14] to March 31, 2002. *Id*. at 55; Ex N. The record shows that the certificate was withdrawn by the Respondent. When asked whether his evaluation may have changed after examining the document, Mr. Norris admitted that it might:

> I would certainly have examined that document as to whether or not it -- the validity, and I couldn't say what the conclusion of it would be.

Tr., 57.

Mr. Norris also admitted that a vice president is not necessarily required to have the power to hire and fire employees:

> My experience would be that the vice-president of a fairly large company would have the authority to hire and fire, to terminate people. However, also my experience tells me that the title of vice-president is basically slapped on just about anybody.

Tr., 58. But Mr. Norris admitted he had not researched the job duties that may constitute the job of "vice president." *Id*. at 59. He later stated as to job description:

> If I could clearly see duties that I would consider to be that of a vice-president then that would be a problem for the company because it maybe something that is a misrepresentation of a material fact on the LCA. But, when I have an LCA it is the rate -- that is what we enforce as the rate of pay of the regulations.

Tr., 62.

On re-direct examination, Mr. Norris was asked:

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[13] It actually states $1,000.80 per year, but Mr. Norris stated that it should be per week. Id. at 24.

[14] The testimony and the document vary. The document shows that the period began on May 1.

Q: When you requested LCAs from Amtel were you requesting every LCA filed by Amtel?
A: Yes.
Q: With respect to the position of internal auditor performed by Rung. Assuming that this is the only additional information you have would it change your conclusion that Exhibit N, the vice-president LCA is the only additional information you now have, would it change you conclusion that Rung performed the duties of the internal auditor?
A: No.

Tr., 69.

Mr. Norris also related that the Prosecuting Party had worked prior to the effective LCA dates, prior to 1995, "and at the end of 1995 she resigned and went back to Thailand." *Id*. at 28; AX 7. At the end of 1998 she told Mr. Norris that she started working for the company again in Ft. Myers. *Id*. He testified that he had no reason to inquire regarding the nature, extent and rate of pay for that work. *Id*. at 29.

The record also contains three other documents from the Respondent that identify the Complainant as vice president of the company. ALJ 1, Ex M and Ex N.

The Prosecuting Party alleged through documentation and testimony that she is entitled to be reimbursed at a rate of $23.75 per hour for "extra work" she performed for the Respondent. Tr., 110. However, on cross examination by the Administrator, she admitted that the Respondent paid her a salary rather than on an hourly rate. *Id*. However she claimed that she was supposed to work only forty hours per week, eight hours per day. Tr., 111; AX 10. On cross examination by the Respondent, she admitted that, although her hours fluctuated, so that she had often exceeded forty hours in a work week, she had always received a salary and was never paid on an hourly basis for the entire time she worked for Respondent. Tr., 127.

The Complainant admits that she did not have the power to hire or fire employees or independently buy or sell business real estate. Tr., 134.

Although the Prosecuting Party alleges that she should have been compensated at the rate of a corporate vice president, Mr. Norris determined that her work under the two LCAs was as an internal auditor. Id., 29 – 31. She sent a letter listing alleged H-1B violations to the U.S. Department of Labor dated July 23, 2003. AX 6. Among the job duties listed included accounting functions, accounts receivable functions, accounts payable functions, audit functions, and a description of Ramada financial accounting. *See* AX 19. Mr. Norris reviewed the Respondent's payroll records. AX 17. These show that the Prosecuting Party was paid $1900.00 dollars for each two week period, beginning December 24, 2001 and ending in February, 2002. He determined that the Complainant was not overpaid for this period. Tr. 33-35, 40. Mr. Norris testified that the required wage rate for an H-1B worker is the higher of the prevailing rate of what they call the actual wage rate. "In this case it's a prevailing wage rate, and the regulations state that as long as the H-1B employee receives 95 pct. of that prevailing wage rate amount, which in this case is $52,041, as long as they receive 95 pct. of that then they have met their obligation." *Id*. at 35.

In AX 23, the letter to the Embassy in Bangkok, the Complainant is referred to as an internal auditor, and on cross examination by the Administrator, she admitted that she did not object to the job description. Tr., 115. Mr. Matney, for Respondent, testified that he was familiar with the job duties she performed for the company and that she worked as an auditor. Tr., 147. However on cross examination, he admitted that he was not familiar with the work that she had

performed for the family that owned the hotel. *Id*. at 158. She was listed as vice president in the telephone directory. *Id*. at 168.

Mr. Matney also admitted that the Complainant, rather than he, was in direct contact with the owners. *Id*. at 169.

Vacation

The Complainant alleged that she had performed work for the Respondent during the period she was "on vacation." Tr., 89-90, 115-117. However, Mr. Norris testified that he was not able to substantiate it. Tr., 72. But he did not try to contact Chai Thangsumphant, officer of Respondent, to get this information. *Id*.

According to Mr. Matney, the Complainant was not entitled to any vacation pay, because it had not been earned. Tr., 144 He testified that the Complainant would become eligible for vacation pay on her following anniversary date of hiring. *Id*. However in explaining it, he stated that she may have been entitled to vacation from her work for the company for the period, 2001 to 2002. *Id*. at 145.

However, the Respondent admitted that the Complainant was entitled to vacation pay and has stipulated to it. Tr. II at 18.

Health Insurance

The Complainant also alleged that she had been charged an additional sixty dollars ($60.00) for health insurance coverage that she did not receive. Ex W, AX 17 at 37 - 38.[15] Mr. Norris testified Respondent does not owe the money, as it was for a period after May 30, 2003, when she her job had been terminated. Tr., 43 – 44; AX 26; Ex G.[16]

The documents show that the certificate for coverage for health insurance ended April 30, 2003. Ex W; Tr., 118; Ex F (pay slips); AX 17 (payroll deductions).

In the telephone hearing held February 19, 2004, the Respondent stipulated to the fact that the Complainant was improperly charged for medical coverage. Tr. II at 19.

Room and Board

Mr. Norris determined that during the course of her employment, the Prosecuting Party also received a hotel room for most of her employment under the LCAs and board, three meals per day worth $3.25 per meal, ten (10) dollars per day, for the entire period as part of her compensation package. *Id*. at 35-38. Mr. Norris testified that the Complainant received meals as part of her employment package. *Id*. at 38. The Respondent claimed that it provided a "free" room valued at thirty three dollars ($33.00) per day for the periods March 1, 2000 to October 9, 2000, and also from May 21, 2002 to May 30, 2003. *Id*.

The Complainant had entered into a rental agreement with Respondent. *Id*. at 39; AX 21. Mr. Norris discussed the matter with the Complainant, and she admitted that she had received lodging as part of her compensation package. *Id*. at 39. AX 21. He determined that room and board were of value and were part of her total compensation package supplied to her by the Respondent. Tr., 41.

A review of the rental agreement shows that it covered a period from October 9, 2000 to October 9, 2001, and that the Complainant agreed to pay Respondent $251.86 every two weeks

[15] These are for the two-week period ending May 25, 2003, and the two-week pay period ending June 8, 2003. Id.
[16] The termination letter.

for rent. AX 21. In May, 2002, she signed a second rental agreement, again to pay rent of $251.86 every two weeks. Ex H; AX 4; AX 13.

On cross examination by the Prosecuting Party, Mr. Norris admitted that he did not obtain Respondent's records to substantiate the actual cost of the room and board. *Id*. at 51. He also did not request other employee records or records to show the records of other employees as to food, room and laundry allowances. Id. Mr. Norris advised that the information was provided to him by record counsel for the Respondent.

On cross examination by the Respondent, Mr. Norris testified that:

1. Complainant admitted that she was provided employee meals.
2. Complainant was provided $200 per month for food allowance to eat in the restaurant in addition to the employee meals.
3. Complainant was also provided $60 a month in laundry allowance.

Tr., 67; AX 10, AX 18.

Mr. Matney, for Respondent, testified that the values for food, shelter and laundry were accurate. Tr., 146.

However, despite the assertions as to value of in-kind payments and employee expense accounts, Mr. Norris did not calculate any amount received. Tr., 68.

In testimony, the Complainant admitted that she had received room and board, but asserted that she did not eat in the hotel every day. Tr., 122-123. She did not deny that she received a laundry allowance, but asserted that she did her own laundry. *Id*.

Mr. Matney testified that he also received room and board as well as a one hundred dollar ($100.00) per month laundry allowance. *Id*. at 148. He stated he personally received a three hundred dollar ($300.00) per month food allowance. Id. He alleged that he was offered three meals per day. *Id*.

On cross examination, however, Mr. Matney admitted that the hotel did not serve employees three meals per day. *Id*. at 149. He testified that it was true that employees generally were not offered more than one meal per day, alleging that "as a manager I was offered more." *Id*. at 150.

Travel Expenses

Mr. Norris also was directed by the Complainant to travel expenses that she had paid to go to Thailand, from May 10, 2003 to June 2, 2003. *Id*. at 42. After his investigation, he determined that the travel expenses were not the Respondent's obligation. *Id*. at 42-43.

The Complainant testified that traveling expenses were recurrent with her employer. She maintains that her "vacation," also had a business purpose. Tr., 89-90, 116-117. She carried a contract of sale for the company from Ft. Myers to Bangkok. *Id*. Normally, she would submit her receipts for traveling, but the company also had established "fixed traveling expenses" that include the taxi fee from the airport to her home, from her home to the airport, and also from the Ft. Myers airport to the hotel. *Id*. at 116.

Mr. Matney admitted that the Complainant was in direct contact with the "owners" of the hotel as to repayment of expenses. *Id*. at 169.

Unreimbursed Miscellaneous Expenses

The Complainant alleged that she had spent $1,153.85 on behalf of the company that had not been repaid, such as mailing expenses, the cost for her visa application, the airport fee, and the transport fee. Tr., 89; AX 19. Mr. Norris testified that he was not able to determine that that

is an expense, or that those were expenses that would have to be borne by the Company. Tr., 73 When directed to his letter, to expenses he had allegedly itemized, he advised "Those are expenses that I determined are expenses that do not have to be borne by the Company." *Id*.

The Complainant testified that these were incurred when she returned to Thailand for her vacation. Tr., 89. She stated that she had hand delivered certain documents for the company from Ft. Myers to Bankok. She testified that Chai "told me – give me an inspection to obtain the meeting with him…. He say it is the company work, that I got to go there." *Id*. at 89-90. She also asserted that before she left Ft. Myers, "Mr. Chai", the authorized officer of Respondent, issued her a letter to take to the United States Embassy to request approval of her visa extension. AX 23. A second letter was addressed to the United States Immigration Service. AX 24. "So, actually this is a part of what I did for the company." Tr., 98.

Mr. Matney, called as hotel manager, was asked whether the owners used the Complainant to deliver messages.

> THE WITNESS: It all depends who they wanted to send a message to. I mean, she worked directly for the girls, Suwalee and Chevy.
> JUDGE SOLOMON: And, who are they?
> THE WITNESS: They're part of the owners.
> JUDGE SOLOMON: Okay. So, with respect to -- she's asking for expenses for example.
> Who would normally be the person to pass on expenses?
> THE WITNESS: Suwalee or Chevy. At that time they would have been the ones that would authorize payment.

Id. at 169. He also admitted that "Suwalee and Chevy" would reimburse expenses. *Id*.

Termination

According to Mr. Norris, the Prosecuting Party's employment ended May 30, 2003. Tr., 44-46; AX 26; Ex G. The document terminating Prosecuting Party's employment is an Amtel Group of Florida memorandum, dated June 1, 2003 to Complainant from Respondent's Chairman, Chai Thangsumphant. *Id*. At that time, the Prosecuting Party was in Thailand. *Id*. Mr. Norris testified that the Complainant does not contest the fact that her position was terminated. Tr., 45. He also asserted that the Respondent was not required to provide compensation past the date of termination. *Id*. at 46.

The Administrator takes the position that there is no jurisdiction regarding this issue. Tr., 103.

The Complainant alleges that she was wrongfully terminated and that she was embarrassed and humiliated by the Respondent. For example, she was escorted from the building by a police officer. Tr., 105, 107.

Work on the Estate

The Complainant also alleges that she should be compensated $37,187.65 for work she performed for the Respondent on the estate of Mr. Chavanuch Thangsumphant during the period from July 7, 2001 to May 9, 2003. AX 19. The Prosecuting Party alleges that she did the work under the direction of Ms. Suwalee Thangsumphant, the ex-President of Respondent. Tr., 86. However, the Complainant did not submit periodic bills for the work. *Id*. She did not bill the estate. *Id*. She testified that she had not filed a claim in State Court in the liquidation proceeding. *Id*.

Discrimination

The Prosecuting Party alleges that the Respondent wrongfully discriminated against her. She objects to the fact that she was escorted from the building by a policeman and other terminated employees were not. Tr., 105.

On July 30, 2003, the Complainant filed a claim with the Florida Commission on Human Relations, alleging discrimination on the basis of race, sex and national origin. Ex LL.

She also requests that any bad records should be expunged, or have the Respondent issue a memo informing employees that a previous memo was improper.

During the course of the hearing, I asked her to identify any acts of discrimination. She alleged that the company treated her differently than another employee when she was terminated.

> The company for sure had evidence that he had misconduct, and they did terminate him. And this issue in the memo to confidential transfer, they transfer him to other department. And, later on he resigned, and then he come back to use the hotel service. And, but for my case the hotel asked the policeman to escort me out of the office.

Tr., 105.

However, Mr. Matney testified that the other employee was prosecuted for stealing by the company. He also stated that another person had to be escorted from the premises in the same manner as she. Tr., 155. According to Mr. Matney, he had been told that the Complainant was fired for interfering in family business. Tr., 154.

The Department of Labor H-1B Finding

The Department, by Juan Coria, Assistant District Director, issued a finding that Amtel Group of Florida, Respondent, owes Complainant $1,000.79. AX 3. According to Mr. Norris, the Complainant was approved for three weeks of vacation pay, and she was only paid for two weeks, at the end of her employment. Tr., 47. Respondent paid the back wage assessment. *Id*.

EVALUATION OF THE EVIDENCE

I have reviewed the entire record. I give little weight to documents that surround the parties' attempts at settlement and mediation. I note that the Respondent attempted to have the Complainant accept terms in separation agreements, and that an attempt was made at a global mediation, but that there is no effective settlement agreement. [17] A review of the time line shows that the Complainant did not allege that she was subject to a claim under the LCAs in question until July 23, 2003. AX-19. She was given several opportunities in testimony to demonstrate whether the Respondent was directly or constructively placed on notice of an INA violation prior to that date, but failed to establish it.

The Complainant has alleged that an inability to reach agreement should be considered as an aspect of this action, but it is against public policy[18], judicial economy and the rules of evidence to consider the respective parties' good faith attempts at negotiation and settlement. A

[17] Arguably the break-off of negotiations could be seen as adverse employment activity, ***The Connecticut Light & Power Co. v. Secretary of the United States Department of Labor***, 85 F.3d 89 (2d Cir. May 31, 1996). However, I find that the Complainant failed to establish that she was engaged in a protected activity prior to the filing of her claim, effective July 23, 2003. See discussion concerning retaliation, *infra*.

[18] For example, Civil Rule of Evidence 408 excludes settlement negotiations from evidence. Non showing of any exception has been proven.

review of the evidence shows that bad faith was not proven or even articulated. Therefore, Ex Ex D, Ex EE, Ex FF, and OO are entitled to limited weight.

I also note that, although the Respondent has sent the Complainant a check to satisfy the Administrator's finding, the amount remains in dispute.

I also note that, although Mr. Norris and Mr. Matney testified live, the Complainant testified via the telephone. Therefore, I do not rely on demeanor evidence with respect to her testimony. I do, however, find that her testimony and version of her story are more consistent with the full weight of all of the other probative evidence and more credible than those of the other witnesses for reasons more fully set forth below.

The Prosecuting Party requested that I assess several claims that may/may not be actionable under common law, the State of Florida or in other Federal Statutes. I do not have jurisdiction over those claims.

Internal Auditor vs. Vice President

The Prosecuting Party denies that she was paid at the rate of either a vice president or an internal auditor, and asserts that she was paid at a lower rate. Tr., 124.

Under the law:

- The job offered must be one which requires a bachelor's degree or higher
- The foreign worker must have acquired a bachelor's or higher degree
- The foreign worker must be qualified for the job by having the correct background
- The job offered must pay at least the prevailing wage that is paid to U.S. workers in the same geographic area for that type of job.

20 CFR Part 655 Subpart H.

To protect American workers, Congress has required H-1B employers to make certain attestations on the LCA which is submitted for certification. [19] The employer must attest that it will pay the greater of the actual wage rate it pays to all other employees with similar experience and qualifications or the prevailing wage for such position in the geographical area of employment. The employer must also guarantee that hiring the H-1B worker will not adversely affect the working condition of U.S. workers; provide notice of the H-1B hiring to its U.S. workers; and attest to the non-existence of a strike or lockout at the worksite.[20]

Internal Auditor

Although the Respondent must stand by its certification, the Complainant has the burden to show that she was not an internal auditor and/or she was a vice president of Respondent. Because the burden of proof is on the employer to establish the truthfulness of the information, 20 CFR § 655.740(c), the burden is one of production rather than persuasion.

The Respondent bears the burden of establishing that the wage paid to the Complainant is the greater of the actual wage rate paid to all other workers with similar experience and qualifications for the specific employment in question or the prevailing wage. 20 CFR

[19] INA § 212(n)(1), 8 U.S.C. § 1182(n)(1). Note that under the law current during the pendency of this case, if an employer is deemed to be "H-1B dependent" or a willful violator, the American Competitiveness and Workforce Improvement Act (ACWIA) requires additional attestations regarding the non-displacement and recruitment of U.S. workers to be made. INA § 212 (n)(1)-(3); 8 U.S.C. § 1182(n)(1)-(3).

[20] 20 C.F.R. § 655.731, § 655.732, § 655.733 and § 655.734.

655.731(a). The law does not preclude the employer from paying the foreign worker more than the higher of the actual wage or the prevailing wage.

In testimony, Mr. Norris identified a prevailing wage rate determination of $1,000.80 per week prepared by the Florida Department of Labor Employment Service. *Id*. 22-24; *See* AX 10.[21] He testified that he did not have any reason to question the source and the amount of the prevailing wage reflected in the LCAs. *Id*. at 24. The Complainant does not allege that the computations by the Florida Department of Labor and Employment service are incorrect. *See e.g.*, Tr., 124-126.

The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining the wage level, the following factors may be considered:

- Experience,
- Qualifications,
- Education,
- Job responsibility and function,
- Specialized knowledge, and
- Other legitimate business factors.

"Legitimate business factors," for purposes of this section, mean those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. Where there are other employees with substantially similar experience and qualifications in the specific employment in question -- i.e., they have substantially the same duties and responsibilities as the H-1B nonimmigrant -- the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer. Where the employer's pay system or scale provides for adjustments during the period of the LCA, e.g., cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation -- such adjustments shall be provided to similarly employed H-1B nonimmigrants (unless the prevailing wage is higher than the actual wage). 20 CFR 655.731(a)(1).

The prevailing wage is determined by reference to wages paid by other employers to individuals with similar experience and qualifications in the area of intended employment. An employer may use an independent authoritative wage source in lieu of a prevailing wage determination. 20 CFR § 655.731(a)(2).[22] The term, "independent authoritative source" means a professional, business, trade, educational or governmental association, organization, or other similar entity, not owned or controlled by the employer, which has a recognized expertise in the

[21] It actually states $1,000.80 per year, but Mr. Norris stated that it should be per week. *Id*. at 24.

[22] The prevailing wage shall be determined as follows: (1) If the job opportunity is in an occupation covered under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage shall be at the rate required under the statutory determination. (2) If the job opportunity is in an occupation not covered under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage shall be: (i) The average rate calculated by adding the wages paid to workers similarly employed and dividing by the number of such workers (weighted average). Basic types of wage information covered under this category are published weighted surveys, state employment service agency (SESA) surveys or ad hoc surveys. (ii) If the job opportunity is covered by a union contract, the wage rate set forth in the union contract shall be considered the prevailing wage. *See* 20 CFR § 655.731.

occupational field. 20 CFR § 655.655.920.[23] Some of these are recorded in the Department of Labor Online Wage Library ("OWL") and rely on the appropriate wage reported there as an "independent authoritative source" for the prevailing wage it enters on the LCA. The independent authoritative source survey must meet all the criteria set forth in paragraph 20 CFR § 655.731(b)(3)(iii)(B).

The LCAs provided to Mr. Norris designate the position of internal auditor. Tr., 20-21; AX 1 and AX 2. However, recent evidence was introduced to substantiate the Prosecuting Party's allegation that she is entitled to be paid at the rate for a corporate vice president. Ex N, ALJ-1. The record also shows that at the time that Mr. Norris did his investigation, the Respondent did provide the Complainant with some indicia that she was a company vice president. For example, they identified her as a vice president on the telephone directory. Ex T.; and the Respondent identified her as a vice president in a memorandum signed by Chavalit Thangsumphant, Chairman of Respondent, dated April 5, 1999, that lists the Complainant as "Vice President - Accounting and Finance". Ex C; AX 4, p. 7.

Although the Complainant did not furnish a *curriculum vitae*, the record does contain the Complainant's qualifications. She has a master's degree in business administration from the University of Arkansas, and the Respondent certified that she had been employed with the company, performing the same duties of the internal auditor job that it had certified. Ex L; AX 4, p. 20. Moreover, the record shows that she had previously been the Respondent's acting president and had held the title of vice president. ALJ-1, ALJ-2.

Also included are pay records for the period March 31, 2001 to June 30, 2002. AX 16, AX 17. These records show that the Complainant was paid at the rate of $1900.00 every two-week pay period. I note that, although the period in question is from November 29, 1999 (AX 1) to May 31, 2003, the record does not contain pay records for the period November 29, 1999 to March 31, 2002. I also note that no pay records were furnished for the pay of Atchara Gesmarid, who was also listed as a Vice President in the memo dated April 5, 1999. AX 4, at 7; Ex C.

Based on the records he was furnished, Mr. Norris determined that the Complainant was not a vice president. However, he did not have a copy of the 1999 LCA at the time he made his decision, he did not have the letter from Suwalee Thangsumphant identifying the Complainant as a vice president, he did not take an audit of the duties that a vice president of Respondent or a similar company would perform, and he did not receive job descriptions for all of the jobs and positions of the Respondent. Tr., at 59.

Although he testified on direct examination, he based his determination, in large part, on what he perceived to have been the corporate authority granted to the Complainant. Mr. Norris, however, admitted that a vice president is not necessarily required to have the power to hire and fire employees. He admitted that the "title of vice-president is basically slapped on just about anybody." Tr., 58.

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[23] Independent authoritative source survey means a survey of wages conducted by an independent authoritative source and published in a book, newspaper, periodical, looseleaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's attestation and each succeeding annual prevailing wage update. Such survey shall:

(1) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data--e.g., within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

Id.

The Complainant admits that she did not have the power to hire or fire employees or independently buy or sell business real estate. Tr., 134.

Although the Prosecuting Party alleges that she should have been compensated at the rate of a corporate vice president, Mr. Norris determined that her work under the two LCAs was as an internal auditor. *Id*. at 29-31. She sent a letter with an attached document listing alleged H-1B violations to the U.S. Department of Labor dated July 23, 2003.[24] AX 6, AX 7. Mr. Norris stated that among the job duties listed included accounting functions, accounts receivable functions, accounts payable functions, audit functions, and a description of Ramada financial accounting practices. *See* AX 19. Mr. Norris reviewed the Respondent's payroll records. AX 17. These show that the Prosecuting Party was paid $1900.00 dollars for each two-week period, beginning December 24, 2001 and ending in February, 2002. He determined that the Complainant was not overpaid for this period. Tr. 33-35, 40. Mr. Norris testified that the required wage rate for an H-1B worker is the higher of the prevailing rate of what they call the actual wage rate. "In this case it's a prevailing wage rate, and the regulations state that as long as the H-1B employee receives 95 pct. of that prevailing wage rate amount, which in this case is $52,041, as long as they receive 95 pct. of that then they have met their obligation." *Id*. at 35.

In AX 23, the letter to the US Embassy, the Complainant is referred to as an internal auditor, and on cross examination by the Administrator, she admitted that she did not object to the job description. Tr., 115. However, a review of the statement sent to Mr. Norris alleges that in addition to auditing, she did accounting and finance work. AX 7, at 6. Mr. Matney, for Respondent, testified that he was familiar with the job duties she performed for the company and that she worked as an auditor. Tr., 147. However on cross examination, he admitted that he was not familiar with the work that she had performed for the family that owned the hotel. *Id*. at 158. He knew that she was listed as vice president in the telephone directory. *Id*. at 168.

Mr. Matney also admitted that the Complainant, rather than he, was in direct contact with the owners. *Id*. at 169.

In testimony, neither Mr. Norris or Mr. Matney were directed to ALJ-1, which shows that the Respondent's president considered the Complainant to be the Respondent's vice president.

The Prosecuting Party also alleged through documentation and testimony that she is entitled to be reimbursed at a rate of $23.75 per hour for "extra work" she performed for the Respondent. Tr., 110. However, on cross examination by the Administrator, she admitted that the Respondent paid her a salary rather than on an hourly rate. *Id*. However, she claimed that she was supposed to work only forty hours per week, eight hours per day. Tr., 111; AX 10. On cross examination by the Respondent, she admitted that, although her hours fluctuated, so that she had often exceeded forty hours in a work week, she had always received a salary and was never paid on an hourly basis for the entire time she worked for Respondent. Tr., 127.

The Complainant testified that in addition to auditing duties, she also performed accounting duties. AX 19; Tr., 132. In a letter to the Department of Labor dated October 3, 2003, she alleged that she was one of the co-signers of the company's and hotel's checks, as well as in charge of reviewing hotel's purchase order forms and check request forms, handling all "administrative works," kept all accounting and financial records of the parent corporation and its subsidiaries. AX 13. The Prosecuting Party also listed certain documents that would, if produced, support her allegation. She cited to corporate and hotel checks, cancelled checks that bear her signature, hotel purchase order forms, check request forms, payment vouchers, memos and other correspondence. *Id*. She testified that she was authorized to sell some of the company

[24] ESA Form WH-4, which is not more than a check-off form.

assets. Tr., 133; AX 19. She also helped to coordinate the sale of some of the company's real estate. *Id*. at 134. She acted as company liaison with attorneys. *Id*. She said that this could be cooborated, but that the company documents regarding the transactions were not available to her. *Id*. at 135. She provided the Administrator with lists of witnesses who could verify her assertions. AX 13.

The elements to make a determination regarding the Complainant's occupation generally are:

- Experience,
- Qualifications,
- Education,
- Job responsibility and function,
- Specialized knowledge, and
- Geographic area.

See e.g., General Administration Letter (GAL) 2-98, dated October 31, 1997 and Training and Employment Guidance Letter No. 5-02, "Clarification Of Level I And Level II Skill Levels For The Purposes Of Prevailing Wage Determinations" (Department of Labor , August 7, 2002). In determining which occupational categories in the area of intended employment require levels of skills similar to those involved in the employer's job offer, information contained in the Dictionary of Occupational Titles, the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles, and, in particular, the Guide to Occupational Exploration code are instructive. If it is necessary to use these guides, the process will lead to a DOT classification which must then be crosswalked to the appropriate SCA or OES code. GAL 2-98, II D.

However, none of the parties has provided much guidance regarding the standard to evaluate whether the Complainant is entitled to be considered a vice president, rather than an internal auditor. None of the parties provided any vocational expert testimony. The Respondent did not cite any "legitimate business reasons" for calling the Complainant an internal auditor rather than a vice president in the LCAs. It did not present any testimony to show that there had been a variance in the duties assigned to her. There was no evidence that her work was outside the duties she was assigned by higher management.

The LCA marked for a vice president's position sets forth a rate of pay at $5200 per month and a prevailing rate at $5208.66 per month. Ex N. Section 656.40(a)(2)(i) provides that the wage offered only needs to be within five percent of the average rate of wages.

Although the Complainant alleges she should be paid overtime for work done in excess of forty hours per week, the evidence shows that she was a salaried employee, exempt from overtime. The Federal Labor and Standards Act (FLSA) requires that employers pay employees a minimum wage, and overtime for any hours worked beyond the 40-hour work week. The FLSA, however, does not apply to exempt workers who are usually paid a regular salary, regardless of the number of hours of work and are not paid an overtime wage. The FLSA specifically exempts executives, administrative personnel, and other professionals. *See* 29 U.S.C. Sec. 213. A salary basis is defined as payment on a weekly or less frequent basis of a pre-determined amount constituting all or part of compensation, without reductions for variations in the quality or quantity of work performed. *See* 29 CFR Sec. 541.118. The record shows that the Complainant was paid $1900 every two weeks, and that there were no deductions nor exceptions for overtime. Therefore, I accept that Complainant was an exempt salaried employee, and that she is not entitled to overtime.

I also accept that as either a vice president or an internal auditor, Complainant was an "executive" or other professional.

An employer may risk the exempt basis of an employee by compensating an exempt employee for hours worked over 40 hours by providing extra pay to employees on the basis of hours worked in excess of 40. The federal courts are split on whether this removes them from the exempt status or not. However, the Complainant failed to prove that she had been compensated for such work or that it was part of her contract of employment or that similarly situated employees were paid for overtime. [25]

In determining whether the Complainant was an internal auditor, one factor to be considered is the credibility of the Complainant and the other witnesses on this issue. In AX 23, the letter to the US Embassy, she is referred to as an internal auditor. Tr., 115. She did not protest at that time, because, "I know that the company wants to pay me at the lower rate, and if I show any objection I quite sure they will terminate me." *Id*.

As to job responsibility and function, I note that whereas the job description supplied by the Respondent limits the job to:

1. Review of financial reports and inventory records and property looking for fraud, errors, waste and adequacy of accounting and inventory systems and
2. Personnel's compliance with system recordkeeping requirements,
3. Issue reports to management with recommendations,[26]

I find that although she may have performed the enumerated functions, she also performed numerous other functions. The Complainant testified that in addition to auditing duties, she also performed accounting duties. Tr, at 132. In a letter to the Department of Labor dated October 3, 2003, she alleged that she was one of the co-signers of the company's and hotel's checks, passing on all expenses at a time that would precede audit. She also alleged that she was in charge of reviewing the hotel's purchase order forms and check request forms, handling all "administrative works," and kept all accounting and financial records of the parent corporation and its subsidiaries. AX 13. She cited to corporate and hotel cancelled checks that bear her signature, to hotel purchase order forms, check request forms, payment vouchers, memos and other correspondence. *Id*. She testified that she was authorized to sell some of the company assets. Tr., 133. She also helped to coordinate the sale of some of the company's real estate. *Id*. at 134. She acted as company liaison with attorneys. *Id*.

She said that the company documents regarding the transactions were not available to her. *Id*. at 135. On September 23, she provided Mr. Norris with lists of witnesses who could verify her assertions. AX 13. The Complainant did not request that the Respondent produce these documents, but the burden to maintain these records[27] is on the Respondent and the

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[25] A special provision of the FLSA allows public employees to accumulate leave time in place of being compensated in money for work in excess of 40 hours per week. This accumulated leave is called "compensatory time" or "comp time." The Act does not permit non public employers, such as the Respondent, to provide comp time in lieu of overtime. Mr. Matney admitted that the company provided "comp time," compensatory time, for managers on duty. "If they worked six days, they'd get a day off for that." Tr., 151. However, the Complainant did not prove that she was a manager and that she had worked "on duty" for the company. As an exempt person under the FLSA, this issue is not applicable to the Prosecuting Party.

[26] AX 4; AX 8, p. 3;Ex B

[27] "The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application." 20 CFR § 655.740(c). Upon certification of an LCA, the regulations impose on the employer the responsibility of developing and maintaining "sufficient documentation to meet its burden of proof with respect

allegations create an inference that has not been challenged, since the Respondent did not provide testimony or documentary evidence to controvert these allegations. Apparently, the Administrator failed to perform a thorough examination of the Respondent's records and did not request the records identified by the Complainant.

Moreover, the Prosecuting Party's complaint is in the nature of a bill of particulars. I do not accept the legal assertions and implications that she made in the September 23 letter, but I do accept that the facts she alleges are credible. For example, I accept that in April, 1993, Amtel Group of Florida, Inc. was incorporated as a Florida corporation and that it runs a hotel business named "Ramada at Amtel Marina," which employs about 65 to 90 people. I also accept that on December 19, 1998, the Complainant was rehired as an Auditor for Amtel Group of Florida, Inc. by Respondent's then Chairman Chavalit Thangsumphant. During Dec. 19, 1998 to Feb. 29, 2000, the Complainant received her salary from the Bangkok Office. On Apr. 5, 1999, the Complainant was appointed as a Vice President for Accounting and Finance.

The record shows that the company had identified the Complainant as "Vice President for Accounting and Finance" in a memo. Ex C; AX 4. p. 7. The company directory also listed her as a vice president. Tr., 168. Mr. Matney, for Respondent, testified that he was familiar with the job duties she performed for the company and that she worked as an auditor. *Id*. at 147. However, on cross examination, he admitted that he was not familiar with the work that she had performed for the family that owned the hotel. *Id*. at 158. She was listed as vice president in the telephone directory. *Id*. at 168. Mr. Matney also admitted that the Complainant, rather than he, was in direct contact with the owners. *Id*. at 169.

Mr. Norris was not given the documents that the Complainant identified in her July 23 letter, which she claimed would substantiate her allegation that her job duties exceeded those described in the LCAs. Such items as cancelled checks and correspondence should have been easily obtainable. Mr. Norris used a single test, whether the Prosecuting Party had the authority to hire and fire employees, to determine her job status. Tr., 31. On cross examination by the Complainant, Mr. Norris was directed to a third LCA that had been approved May 1, 1999. Tr., 52-55; Ex N. He testified that he had never seen that document prior to hearing. Tr., 54. The document shows that a vice president position was approved for the Respondent for the period April 1, 1999[28] to March 31, 2002. *Id*. at 55; Ex N. The record shows that the certificate was later withdrawn by the Respondent. When asked whether his evaluation may have changed after examining the document and after he had been apprised of its existence, Mr. Norris admitted that it might have. Tr., 57.

The record also shows that the Respondent cloaked the Complainant with the apparent authority to act as more than an internal auditor. Again, it listed her as a vice president in its telephone directory. Credible testimony shows that the Respondent's President sent her to third parties to negotiate on the company's behalf. Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons. ***Restatement (Second) of Agency***, American Law Institute, adopted May 23, 1957, § 8. Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted,

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to the validity of the statements made in its labor condition application and the accuracy of information provided in the event that such statement or information is challenged." 20 CFR § 655.710(c)(4).

[28] The testimony and the document vary. The document shows that the period began on May 1.

causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. Restatement, § 27. I accept that although the LCAs list the Complainant as an auditor, the Respondent created a conflict in the evidence by referring to the Complainant as a vice president. It also placed her in situations where third parties had reason to believe that she had authority to act on behalf of Respondent company. These facts create an inference that the Complainant was more than an auditor.

The apparent authority is confirmed as actual authority in the letter written by the Respondent's former president, identifying the Prosecuting Party as the company vice president. ALJ-1. It is apparent that the Complainant had been the vice president of Respondent company for the term of the two LCAs in question.

Additionally, I accept that the Complainant is credible that her actual job duties exceeded the job description that the Respondent has certified under 20 CFR 655.731(a). I credit the Complainant's testimony that she also was one of the co-signers of the company's and hotel's checks, as well as in charge of reviewing the hotel's purchase order forms and check request forms, handling all "administrative works", and keeping all accounting and financial records of the parent corporation and its subsidiaries. I also accept that she was authorized to sell some of the company assets, and helped to coordinate the sale of some of the company's real estate. I also accept that she acted as company liaison with attorneys.

Again, the Respondent did not produce any evidence to rebut the fact that the Complainant performed these functions.

I discount Mr. Matney's testimony in that he admitted that he was not in the "loop" to know what the Complainant actually did for the company. In addition, since he testified with some degree of certainty that the Complainant was a mere auditor, I find that his testimony is contrary to the full weight of the evidence. I note that he is the manager of the hotel, but I accept that the hotel is merely part of the Respondent's business interests in Florida, in that these include Amtel Farm, Inc., Amtel FleaMarket Mall, Cattle Pen Corporation, and Amtel Mall, Inc. I accept that Complainant's job duties involved more that auditing.

I also discount Mr. Norris' testimony in that he failed to investigate and determine exactly what the Complainant's function was within Respondent company. Although the burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application, by providing complete documentation to back up its certification, again either Mr. Norris did not develop or was not provided with all of the required material that should be furnished in support of an LCA.[29]

Moreover, the record shows that the Complainant proved that her actual job duties were more closely associated with a finding that she was a vice president, rather than an internal auditor. For example, the Complainant alleges that she performed certain job duties above and beyond the call of duty. Mr. Matney, called as hotel manager, was asked whether the owners used the Complainant to deliver messages.

> THE WITNESS: It all depends who they wanted to send a message to. I mean, she worked directly for the girls, Suwalee and Chevy.
>
> JUDGE SOLOMON: And, who are they?
>
> THE WITNESS: They're part of the owners.

Tr. at 169. Again, Suwalee Thangsumphant was the president of Respondent. AX 1 and AX 2. Again, she substantiates that the Complainant's position was that of a vice president.

[29] 20 CFR § 655.710(c)(4).

Although she seeks separate consideration for her services on behalf of the estate of the late corporate chairman, Prosecuting Party is an exempt employee for overtime purposes. However, I accept that her duties included the following:

- Contacted a real estate broker regarding potential buyers, required staging work and repairs for the late Respondent's chairman's house at San Francisco;
- Prepared and mailed checks to pay expenses of the Estate;
- Requested all relevant documents and information from the concerned persons;
- Summarized expenses of the Estate paid from the Estate's bank accounts;
- Summarized expenses of the Estate advance paid by Amtel's bank account;
- Summarized expenses of the Estate paid from Ms.Suwalee's bank account;
- Conferred with the corporate attorney, the estate CPA, probate attorney, estate litigation attorney, real estate broker, insurance company, banks, and obtained and reviewed a real estate tax appraisal on the Chairman's property;
- Conferred as an agent of the Respondent President with outside counsel;
- Discussed corporate business matters with the probate attorney, and estate litigation attorney;
- Summarized all taxes paid for the Estate and Mr. Chavalit Thangsumphant, the late CEO;
- Drafted most of the correspondence relating to the Estate on behalf of the Respondent company president;
- Reconciled bank accounts of the Estate monthly and sent a copy to interested parties, including the company president;
- Reviewed, documents relating to the Estate and provided recommendations to Ms. The Respondent's president and attorneys;
- Helped sell the Estate's car; prepared advertisement, showed the card issued Bill of sale, deposited money into the account, processed title transfer;
- Helped withdraw money from Ms. Chavalit Thangsumphant 's personal account in order to deposit into the Estate account;
- Protected the benefits of the Estate i.e. demanded the bank to pay $ 7,000 + interest that the bank failed to add to the Estate's account, informed the banks to stop withholding interest on the Estate's account, issued letters to Florida IRS , California / San Francisco IRS in order to request them to waive penalty and interest on the additional tax payment that was paid after the adjustment of the value of the Estate's house at San Francisco, got back deposit on a new car;
- Helped process primary distribution of the Estate's money to all beneficiaries.

See Testimony and Ex GG.

Although I do not accept that all of the duties set forth above are consistent with the duties of a vice president, I accept that some of the duties demonstrate that she was authorized to act for the company beyond those duties set forth by the two operative LCAs. For example, I accept that she was empowered by Ms. Suwalee Thangsumphant, who the Respondent's witness acknowledges as an "owner" of the Respondent, and other evidence identifies as the Respondent's President, to perform the duties. The record shows that Suwalee Thangsumphant was the president of the Respondent who signed the LCAs. AX 1 and AX 2. I also accept that the Complainant conferred with external and internal authorities, such as real estate agents,

lawyers and accountants, negotiated with them and advised them as to the Respondent's interests on behalf of the Respondent.

Although the Complainant has characterized the work performed as work for the estate, I do not accept that all of it was "above and beyond" her contracted duties for Respondent. I note, however, that the majority of the time spent in the estate matter was for the benefit of the estate and not necessarily that of the company. Although I left the record open to receive further evidence regarding work performed on behalf of the estate, nothing further was received.

Therefore, based on a review of the entire record, I find that the Complainant was more than an internal auditor for the company.

Vice President

According to the ***Dictionary of Occupational Titles***, United States Department of Labor, Fourth Edition, Revised 1991, Section 189.117-034, a vice president in any industry:

> Directs and coordinates activities of one or more departments, such as engineering, operations, or sales, or major division of business organization, and aids chief administrative officer in formulating and administering organization policies: Participates in formulating and administering company policies and developing long range goals and objectives. Directs and coordinates activities of department or division for which responsibility is delegated to further attainment of goals and objectives. Reviews analyses of activities, costs, operations, and forecast data to determine department or division progress toward stated goals and objectives. Confers with chief administrative officer and other administrative personnel to review achievements and discuss required changes in goals or objectives resulting from current status and conditions. May perform duties of PRESIDENT (any industry) 189.117-026 during absence. May serve as member of management committees on special studies.

I accept that the Complainant did not perform all of the duties set forth by the ***Dictionary***, but I also accept that the job description of vice president is more representative of those duties than the duties that were certified in the two LCA's in question.

I have already discussed that the Respondent cloaked the Complainant in apparent authority by listing her in its directory and by reference to her in the Memo as a vice president.

I have also discussed that Suwalee Thangsumphant, as president, had the authority to designate the Complainant as a vice president. I note that the former Chairman of the Respondent, Chavalit Thangsumphant, also referred to her as a vice president. Ex M.

I also accept that as president of the company, Suwalee Thangsumphant had the capacity to designate to the Complainant whatever duties she deemed were in the best interest of Respondent.

I note that Respondent has not provided any evidence to the contrary.

I must discount Mr. Norris' opinion as to whether the Complainant was actually a company vice president. Mr. Norris admitted that, although he used it as the primary basis for his decision, a vice president is not necessarily required to have the power to hire and fire employees. If the tile can be "slapped on just about anybody," a company stands responsible for the title it places on an employee. Mr. Norris also failed to distinguish between auditing duties and accounting or managerial duties.

Because the Respondent has the duty to certify the job duties, the burden of proof is on the Respondent to establish that the wage paid to the Complainant is the greater of the actual wage rate paid to all other workers with similar experience and qualifications for the specific

employment in question or the prevailing wage.[30] The only evidence in the record as to the prevailing rate of pay for the vice president's position is in Ex N. I note that the method used to establish the rate is acceptable under the regulations.

Therefore after a review of the record, I find that the Complainant was a vice president of the Respondent and has not been paid at the rate a vice president should be paid. If an employer has not paid wages at the wage level specified under the application and required under the law and regulations, I am required to order the employer to provide for payment of such amounts of back pay as may be required to comply … whether or not a penalty under subparagraph (C) has been imposed. I find further that the Respondent must pay the Complainant at the prevailing rate, $5208.66 per month. *See* Ex N.

Vacation

The Complainant alleged that she had performed work for the Respondent during the period she was "on vacation." Tr., 89-90, 115-117. However, Mr. Norris testified that he was not able to substantiate it. Tr., 72. However, he did not try to contact Chai Thangsumphant, officer of Respondent, to get this information. *Id*.

According to Mr. Matney, the Complainant was not entitled to any vacation pay, because it had not been earned. Tr., 144. He testified that the Complainant would become eligible for vacation pay on her following anniversary date of hiring. *Id*. However, in explaining it, he stated that she my have been entitled to vacation from her work for the company for the period, 2001 to 2002. *Id*. at 145.

The Respondent, however, has stipulated and otherwise admitted that vacation was owed. RX 12; Tr. II, 19. In addition, Mr. Matney's testimony is impeached by a Personnel Change Form (PCF) that shows that the vacation taken by the Prosecuting Party from May 10 to June 1, 2003, had been earned for work performed from Dec. 19, 2001 to Dec. 18, 2002. Ex I.

A review of all of the evidence substantiates that the vacation is owed to the Complainant. Moreover, the parties' stipulations will be enforced unless contrary to public policy. Thus, where a stipulation on the payment of attorney fees and costs was not contrary to public policy, the Secretary approved it in ***Tritt v. Fluor Constructors, Inc.***, 88-ERA-29 (Sec'y May 31, 1995).

Therefore, I find that the Respondent must provide pay for the Prosecuting Party's two-week vacation.

Health Insurance

The Complainant also alleged that she had been charged an additional sixty dollars ($60.00) for health insurance coverage that she did not receive. Ex W, AX 17 at 37 - 38.[31] Mr. Norris testified that Respondent does not owe the money, as it was for a period after May 30, 2003, when her job had been terminated. Tr., 43-44; AX 26; Ex G.[32]

The documents show that the certificate for health insurance coverage ended April 30, 2003. Ex W; Tr., 118; Ex F (pay slips); AX 17 (payroll deductions).

In the telephone hearing held February 19, 2004, the Respondent stipulated to the fact that the Complainant was improperly charged for medical coverage. Tr. II at 19.

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[30] INA § 212(n)(1), 8 U.S.C. § 1182(n)(1) and 20 CFR 655.731(a).

[31] These are for the two-week period ending May 25, 2003 and the two-week pay period ending June 8, 2003. *Id*.

[32] The termination letter.

After a review of the entire record, I find that there is no reason to reject this stipulation and find that the Respondent must reimburse the Complainant for any insurance premiums she paid for that term. *See* ***Tritt v. Fluor Constructors, Inc.*** *supra.*

Work on the Estate

The Complainant also alleges that she should be compensated $37,187.65 for work she performed for the Respondent on the estate of Mr. Chavanuch during the period, July 7, 2001 to May 9, 2003. AX 19. The Prosecuting Party alleges that she did the work under the direction of Ms. Suwalee Thangsumphant, the ex-President of Respondent. Tr., 86. However, the Complainant did not submit periodic bills for the work. *Id*. She did not bill the estate. *Id*. She testified that she had not filed a claim in State Court, in the liquidation proceeding. *Id*.

Under the INA and the regulations, as long as the Complainant is a salaried employee and receives within ninety five per cent (95%) of the actual or prevailing wage, the employee must show that there is another basis for payment, outside the LCA. The Complainant has the burden to show that this work was in excess of her employment contract with Respondent, as set forth by a valid LCA, and she has failed to establish that there was an agreement that she would be paid for work above her salary.

Therefore, I find that the Complainant is not entitled to be compensated for work on the estate.

Bona Fide Termination

Under the INA, there must be a "*bona fide* termination of the employment relationship." § 655.731(c)(7)(ii). Although the Complainant was employed in Florida, an employment "at will" state, the regulations impose a higher standard. [33] Both Prosecuting Party and Respondent introduced the Respondent's Employee Handbook, which establishes a "just cause" standard for employee discipline. But a *bona fide* termination is one that is made "with good faith; honestly, openly, and sincerely." ***Black's Law Dictionary 177 (6th ed. 1990).***

The Administrator and the Respondent take the position that there is no jurisdiction regarding this issue. Tr., 103. However, the Respondent's Employee Handbook, states in pertinent part:

> PROGRESSIVE DISCIPLINE
>
> When an employee's conduct interferes with the orderly and efficient operation of the Hotel, employees are given two kinds of "official" warnings: verbal and written.
>
> A verbal warning is a record of a discussion having taken place in which the manager has counseled the employee about a particular problem or incident. Documentation is placed in the employee personnel file. The document serves as a reminder of what was said and will be used for reference should further counselling become necessary.
>
> Written warnings are administered for serious offenses, or where verbal warnings have proven ineffective. Written warnings are reviewed with the employee and are signed as acknowledgement that the warning was read and understood. Refusal to sign a written warning does not make it invalid; a second manager will witness a refusal to sign.
>
> If you receive a written warning you should recognize the grave nature of your actions and make every effort toward corrective action. If you feel a written warning notice is inaccurate, you are encouraged to discuss it with higher management as prescribed in the Fair Treatment Policy.

[33] Under Florida law, policy statements contained in employment manuals do not give rise to enforceable contract rights in Florida unless they contain specific language which expresses the parties' explicit mutual agreement that the manual constitutes a separate employment contract. ***Muller v. Stromberg Carlson Corp***., 427 So. 2d 266 (Fla. 2d DCA1983).

> An employee will be subject to suspension without pay and/or termination under Progressive Discipline when he receives three warnings, one (1) verbal and (2) written, within a twelve month period. Warnings do not need to be for the same offense to warrant consideration for termination.

RX 14.

The record does not show that the Prosecuting Party had been warned or was subject to progressive discipline. The Respondent's policy does address immediate removal for "gross misconduct," but there is no reason for termination given in the Memorandum.[34] In fact, the Complainant was subject to a claim for unemployment insurance, and after an opportunity for the Respondent to be heard on this issue, the State of Florida determined that she had not been removed for misconduct. Ex X. Although this determination is not entitled to collateral estoppel, I do attribute significant weight to the finding that no misconduct occurred.

The record also shows that by May 9, 2003, the Complainant was provided documentation to put herself in a position to return to Ft. Myers to continue working for the Respondent. RX 5. The record shows that the Complainant's position was ostensibly terminated while she was in transit from Bangkok to Ft. Myers. The written notice stated in part:

> Please be advised that she may ONLY return on Sunday, June 1, 2003 until the evening of June 2, 2003, to collect her personal belongings and will be considered a trespasser shall she return afterwards. Employees seeing Ms. Rung on premises without an escort by security or management shall contact any supervisor or department head immediately. Supervisors and Department Heads shall contact our General Manager, Kevin Matney, or security supervisor, James Denny, immediately.

However, the Complainant alleges that she did not leave Bangkok until June 1, 2003 and did not arrive at the hotel until June 2, 2003 at about 1:15 a.m.

I find that the Complainant is credible in that she has provided documents to demonstrate that she was in transit during the period when the Respondent knew or should have known she would have been. Therefore, the Complainant was not notified that her job had been terminated until June 2, 2003. The employer told Mr. Mathis that the Complainant was removed from

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[34] Examples of gross misconduct include:

1. Theft, attempted theft, or removal from the premises without authorization of food, Company property, or the property of another employee, vendor or guest.
2. Careless or willful destruction of, or damage to, the property of the Hotel, another employee, vendor or guest.
3. Possession, consumption, or being under the influence of alcohol or illegal drugs when reporting for work or on Company premises.
4. Gambling on Company time or premises.
5. Failure to report, either by calling or coming in, to work three consecutive scheduled workdays without adequate justification.
6. Willful falsification of Company records or forms, including tip reports, time cards, guest checks, employment applications, etc.
7. Failure to carry out a reasonable job assignment or job request of management after being warned that failure to do so can result in termination.
8. Disorderly conduct including fighting, physical or verbal harassment of another employee, vendor, or a guest, or use of obscene language or gestures in guest contact areas.
9. Possession of any type of fireworks, explosives, or weapon on Hotel premises.
10. Leaving the premises without authorization while on duty.
11. Conviction of a felony for an offense committed while employed by the Company.
12. Tampering with the fire alarm system.
13. Intimidation or interference with the rights of any fellow employee, vendor or guest.
14. Misrepresentation of physical health or condition while employed.
15. Conduct having a significant adverse effect upon the operation or reputation of the Company.

employment because she was identified with the old regime. The only other place in the record where this allegation is made is in correspondence that I consider to be "*post litem motem*," weak evidence after the fact offered as a rationalization. In its response to the EEOC charges, the Respondent alleged that the Complainant was discharged due to insubordination. Ex MM-NN. However, the Respondent has not proffered any proof of insubordination. Again, the Complainant was subject to a claim for unemployment insurance, and after an opportunity for the Respondent to be heard on this issue, the State of Florida determined that she had not been removed for misconduct. Ex X. Although this determination is not entitled to collateral estoppel, I do attribute significant weight to the finding that no misconduct occurred. One would expect that there would have been facts set forth to show that the Complainant in some way had performed acts in opposition to the interests of the employer.

Therefore, I find that the Respondent and the Administrator are not credible on this issue.

Moreover, because the Respondent failed to establish a valid basis for termination, I also find that there has not been any *bona fide* termination, as that term is defined by the statute.

Retaliation

In support of her claim, the Complainant alleges that Respondent discriminated against her on the basis of race, sex and national origin. Ex KK, Ex LL, Ex MM, Ex NN. After a review of those documents, I do not find that the Complainant has raised a viable claim in that she does not allege any facts to show that she was subject to those types of discrimination.

However, 20 CFR §655.801 sets forth: (a) No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has --

> (1) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of section 212(n) of the INA or any regulation relating to section 212(n), including this subpart I and subpart H of this part and any pertinent regulations of INS or the Department of Justice; or
>
> (2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of section 212(n) of the INA or any regulation relating to section 212(n).

The burden is on the Complainant to prove that she is part of a protected class and was was subjected to one of the enumerated acts. It is apparent that 20 CFR §655.801(a)(2) does not apply to this fact pattern. In evaluating whether the Prosecuting Party was the subject of retaliation, and if so, the consequences, must be evaluated by analogy to the nuclear and environmental whistleblower statutes administered by the Department of Labor[35]. The same analysis applies.[36]

A review of the case law shows that principles applicable to other types of discrimination are useful in applying the LCA statutes.[37] By analogy to Title VII discrimination, the

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[35] 8 U.S.C. § 1182(n)(2)(C)(iv).

[36] See 65 Fed. Reg. 80178 (2000) ("The Department is of the view that Congress intended that the Department, in interpreting and applying this provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (See 29 CFR Part 24);" See ***Administrator v. IHS Inc***., USDOL/OALJ Reporter (HTML), ALJ No. 93-ARN-1 at 74 (ALJ Mar. 18, 1996).

[37] For example see ***Administrator, Wage and Hour Division v. Mohan Kutty, M.D. et al***., Cases Nos. 2001-LCA-00010 to 00025 (Oct. 9, 2002).

Complainant has the burden of establishing a prima facie case of discrimination by a preponderance of the evidence.[38] ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 802 (1973); ***Stavropoulos v. Firestone, __F3d __,***No. 02-16486 (11th Cir., Feb. 25, 2004). To establish a prima facie case of discrimination, the Prosecuting Party must demonstrate that:

(1) she is a member of a protected class;

(2) she suffered an adverse employment action; and

(3) the unfavorable action gives rise to an inference of discrimination.

Stavropoulos, *(supra)****; Bass v. Bd. of County Comm'rs, Orange County, Fla.***, 256 F.3d 1095, 1117 (11th Cir. 2001).

Protected Activity

A protected activity is generally defined as

> (1) opposing a practice made unlawful by one of the employment discrimination statutes (the "opposition" clause); or
>
> (2) filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute (the "participation" clause).

The Respondent and Administrator both argue that Complainant failed to show that she is a protected individual as a result of filing this claim or other activity under Section 212(n) of the INA.

In determining whether the Complainant was engaged in a protected activity for evaluation of the discrimination aspect of the statute, "[I]t is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws." ***Bechtel Constr. Co. v. Secretary of Labor***, 50 F.3d 926, 931-32 (11th Cir. 1995); ***Kansas Gas & Elec. Co. v. Brock,*** 780 F.2d 1505, 1512 (10th Cir.1985) (affirming the Secretary's broad interpretation of protected activity). The protection afforded by the statute, by analogy to Title VII discrimination, is not limited to individuals who have filed formal complaints, but extends as well to those, who informally voice complaints to their superiors or who use their employers' internal grievance procedures. ***Rollins v. State of Fla. Dept. of Law Enforcement***, 868 F.2d 397, 400 (11th Cir.1989)

A review of both the INA and the regulation shows that it clearly intends to protect the subjects of LCAs, and the Complainant was a subject of the two LCAs in question.[39] The issue is whether she raised her opposition to Respondent's policy.

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[38] Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

[39] I note that in similar cases involving the interpretation of protected activity, the Secretary has argued that a broad interpretation is necessary. In a whistleblower context see ***The Connecticut Light & Power Co. v. Secretary of the United States Department of Labor***, 85 F.3d 89 (2d Cir. May 31, 1996). *See also* ***Kansas Gas & Elec. Co. v. Brock***, 780 F.2d 1505, 1512 (10th Cir. 1985) (affirming the Secretary's broad interpretation of protected activity), *cert. denied*, 478 U.S. 1011 (1986). To further support his position, in ***Connecticut Light & Power,*** a passage from the legislative history in which the terms "employee" and "any worker" were cited to show that they were used interchangeably, suggesting a loose rather than a strict definition. (Resp't Br. at 22 (citing S. Rep. No. 848, 95th Cong., 2d Sess. 29 (1978), reprinted in 1978 U.S.C.C.A.N. 7303, 7304)). "In view of these considerations, the Secretary chose to adopt a broad definition of employee from other analogous statutes that include former employees so long as the alleged discrimination is related to or arises out of the employment relationship." See, e.g., ***Charlton v. Paramus Bd. of Educ***., 25 F.3d 194, 198-200 (3d Cir.) (Title VII), cert. denied, 130 L. Ed.2d 503 (1994); ***E.E.O.C. v. Cosmair, Inc., L'Oreal Hair Care Div***., 821 F.2d 1085, 1088 (5th Cir. 1987) (including former employees within definition of employee in the context of the ADEA) (citing ***Pantchenko v. C.B. Dolge Co***., 581 F.2d 1052, 1055 (2d Cir. 1978) (per curium)).

In this case, Complainant alleges that she maintained consistently to her employer that she was a vice president, and the record shows that she had been considered to have been a vice president (ALJ-2), was listed as vice president in the Respondent's telephone directory, and that the Respondent had sent a letter identifying her as a vice president prior to even requesting the LCAs. The Complainant testified that she was entitled to be paid as a vice president, and she presented Ex N to show that she had actually been previously so designated. This is evidence that she opposed the Respondent in that her classification as an internal auditor is a violation of INA § 212(n).

However, on examination by the Administrator, the Complainant was asked repeatedly whether she had raised the issue to anyone of authority for Respondent. She testified that she had not because she feared for her job. Tr., 114 – 115.

Moreover the Respondent admits that she was charged for health insurance coverage she did not receive. She also was not paid for two weeks of vacation time that was due and owing. It is reasonable to infer that Complainant had opposed these actions.

The record also shows that although the Complainant signed the rental agreement, a reasonable inference is that she was intimidated into doing so, as in so doing, she effectively discounted her own pay.

The evidence does show that the Complainant had vacillated when asked whether she had objected to being referred to as an internal auditor in AX 24, dated May 9, 2003, but the facts are that the former chairman of the company had passed away and that the Respondent had apparently determined to retain the Complainant's services. It completed necessary documentation to extend the Complainant's visa. See Ex R, RX 5 and Ex S.

However, I recognize that many employees are in a fragile and tenuous position, in that if they complain; they place themselves at risk. Congress took that into account when it wrote several variations on the whistleblower theme. And INA § 212(n) is a statute that intends to protect workers who do not have limited bargaining power.

After a full review of the evidence, I can not accept that the Complainant has established that she was engaged in a protected activity for retaliation purposes. Parsing the statute, the Complainant must show that she had disclosed information to the employer, or to any other person, prior to any of the adverse employment activities that she alleges took place.

Room Rental and/or Credit

An employer shall comply with the "prevailing working conditions" statements of its labor condition application required under §§655.731 and 655.732. All fringe benefits, such as the provision for free rent, must be listed in the LCA. A review of the LCAs does not include any mention of a credit for room rent. AX-1, AX-2, RX 2, RX 6.

Mr. Norris determined that during the course of her employment, the Prosecuting Party also received a hotel room for most of her employment under the LCAs. The Respondent claimed that it provided a "free" room valued at thirty three dollars ($33.00) per day for the periods March 1, 2000 to October 9, 2000, and also from May 21, 2002 to May 30, 2003. *Id*.; RX 11. The Complainant had entered into a rental agreement with Respondent. *Id*.; 39; AX 21. Mr. Norris discussed the matter with the Complainant, and she admitted that she had received lodging as part of her compensation package. *Id*. at 39. AX 21. He determined that the furnishing of room was of value and was part of her total compensation package supplied to her by the Respondent. Tr., 41.

A review of the rental agreement shows that it covered a period from October 9, 2000 to October 9, 2001, and that the Complainant agreed to pay Respondent $251.86 every two weeks for rent. AX 21. In May, 2002, she signed a second rental agreement, again to pay rent of $251.86 every two weeks. Ex H; AX 4; AX 13.

On cross examination by the Prosecuting Party, Mr. Norris admitted that he did not obtain Respondent's records to substantiate the actual cost of the room. *Id*. at 51. He also did not request other employee records or records to show the records of other employees as to food, room and laundry allowances. *Id*. Mr. Norris advised that the information was provided to him by record counsel for the Respondent. Tr., 67; AX 10, AX 18.

Mr. Matney, for Respondent, testified that the value given for shelter was accurate. Tr., 146.

However, despite the assertions as to value of in-kind payments and employee expense accounts, Mr. Norris did not calculate any amount received. Tr. 68.

In testimony, the Complainant admitted that she had received a room. Mr. Matney testified that he also received a room.

Complainant alleges that during the period, she had paid the company the room rental 43 times which totaled $ 10,829.98. The record fully substantiates the Complainant's argument with respect to the rental agreement. RX 11. 20 C.F.R. § 655.731(c) states that "the required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(7) of this section may reduce the cash wage below the level of the required wage." The authorized deduction in subsection (c)(7) includes three elements. The first two of these, § 655.731(c)(7)(i) and (ii), deal with deductions required by law, i.e. income tax and FICA, and deductions allowed by a collective bargaining agreement, and are not implicated here. Therefore, to be considered "authorized," Respondent's claim for a housing deduction must be considered under § 655.731(c)(7)(iii). Subsection (c)(7)(iii) provides for authorized deductions, but includes a list of five criteria, all of which must be met in order for the deduction to be allowable.

The first of these criteria is that the deduction "[i]s made in accordance with a voluntary, written authorization by the employee." 20 C.F.R. § 655.731(c)(7)(iii).

The fourth states: "Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value)."

I accept that the Respondent in effect discounted the Complainant's service by creating a "deduction" for her room. The room rent issue was not addressed in the LCAs. Upon certification of the LCA by the Department of Labor, the employer is required to pay the wage and implement the working conditions set forth in the LCA. 8 U.S.C. § 1182(n)(2). These include fringe benefits. *Id*. Supply of room rental is a fringe benefit.

The record clearly shows other employees were provided a free room as part of their compensation package. RX 9. Mr. Mathis was one of them. However, the record does not contain actual appraisals or cost estimates for the rooms. I also take Mr. Mathis' assertion that the value of the room rent was $300 per week to be a tacit admission that the Complainant was not charged fair market value for the room. 20 CFR § 655.731(c)(9)(iii)(D). Alternatively, I reject his testimony as not substantiated and find that the Respondent failed to establish market value. Respondent did not establish that all of the rooms in the facility bear the same value. I enumerate below several other places in the record where Mr. Mathis' testimony as to other fringe benefits is impeached by documentation.

Therefore, I accept that the Complainant's rent must be subject to recoupment for failure to provide to her a fringe benefit to which she is entitled.

Food and Laundry Allowance

Mr. Norris determined that the Complainant had received board, three meals per day worth $3.25 per meal, ten dollars ($10.00) per day, for the entire period as part of her compensation package. Id. 35-38. Again, the Respondent seeks a credit for the amounts it claims it provided to the Complainant. RX 11. The LCAs do not set forth a credit for these items. AX-1, AX-2, RX 2, RX 6. On cross examination by the Prosecuting Party, Mr. Norris admitted that he did not obtain Respondent's records to substantiate the actual cost of board. *Id*. at 51. He also did not request other employee records or records to show the records of other employees as to food, and laundry allowances. *Id*. Mr. Norris advised that the information was provided to him by record counsel for the Respondent.

On cross examination by the Respondent, Mr. Norris testified that:

- Complainant admitted that she was provided employee meals.
- Complainant was provided $200 per month food allowance to eat in the restaurant in addition to the employee meals.
- Complainant was also provided $60 a month in laundry allowance.

Tr., 67; AX 10, AX 18.

Mr. Matney, for Respondent, testified that the values for food, shelter and laundry were accurate. Tr., 146.

In testimony, the Complainant admitted that she had received a food allowance, but asserted that she did not eat in the hotel every day. Tr., 122 - 123. She did not deny that she received a laundry allowance, but asserted that she did her own laundry. *Id*.

Mr. Matney testified that he also received board as well as a one hundred dollar ($100.00) per month laundry allowance. *Id*., 148. He stated he got a three hundred dollar ($300.00) per month food allowance. *Id*. He alleged that he was offered three meals per day. *Id*.

On cross examination, however, Mr. Matney admitted that the hotel did not serve employees three meals per day. *Id*. at 149. He testified that it was true that employees generally were not offered more than one meal per day, alleging that "as a manager I was offered more." *Id*. at 150.

After a review of the entire record, it is evident that Mr. Matney, as well as Mr. Goldberg, who was also not an officer of the company, received one hundred dollars ($100.00) more per month in laundry expenses and food allowance than did any of the Thai employees, including the Complainant. *See* RX 9, "internal memorandum". Again the Respondent had certified otherwise in the LCAs and the Respondent has not met its burden to establish that it has complied with prevailing working conditions at its Ft. Myers facility.

I find that Mr. Matney's testimony is not credible on this issue, as it is impeached by RX-9.

Therefore, I find that the Respondent violated the prevailing working conditions sections of the law and regulations. Therefore, the Respondent owes the Complainant one hundred dollars ($100.00) per month for food and laundry expenses.

Unreimbursed Miscellaneous Expenses

The Complainant alleged that she had spent $1,153.85 on behalf of the company that had not been repaid, such as mailing expenses, the cost of her visa application, the airport fee, and the transport fee. Tr., 89; AX 19. Mr. Norris testified that he was not able to determine that these are valid expenses, or that those were expenses that would have to be borne by the Company. Tr., 73.

The Complainant testified that these were incurred when she returned to Thailand for her vacation. Tr., 89. She stated that she had hand delivered certain documents for the company from Ft. Myers to Bangkok. She testified that Chai Thangsumphant, the Chairman, "told me -- give me an inspection to obtain the meeting with him…. He say it is the company work, that I got to go there." *Id*. at 89-90. She also asserted that before she left Ft. Myers, "Mr. Chai", Thangsumphant, the authorized officer of Respondent, issued her a letter to take to the United States Embassy to request approval of her visa extension. AX 23, Ex R. A second letter was addressed to United States Immigration Service. AX 24, Ex S. "So, actually this is a part of what I did for the company." Tr., 98.

The Complainant testified that traveling expenses were recurrent with her employer and the trip also had a business purpose. Tr., 89-90, 116-117. She carried a contract of sale for the company from Ft. Myers to Bangkok. *Id*. Normally, she would submit her receipts for traveling, but the company also had established "fixed traveling expenses" that include the taxi fee from airport to her home, from her home to the airport, and also from the Ft. Myers airport to the hotel. *Id*. at 116.

A review of the expenses shows that in part they are:

"Fixed" traveling expenses	$200.00
Passport fee	25.25
Visa fee	115.00
Airport fee	11.90
Express Mail	1.31
Total	$353.76

See AX-19.

Mr. Matney, called as hotel manager, was asked whether the owners used the Complainant to deliver messages.

> THE WITNESS: It all depends who they wanted to send a message to. I mean, she worked directly for the girls, Suwalee and Chevy.
>
> JUDGE SOLOMON: And, who are they?

THE WITNESS: They're part of the owners.

JUDGE SOLOMON: Okay. So, with respect to -- she's asking for expenses for example.

Who would normally be the person to pass on expenses?

THE WITNESS: Suwalee or Chevy. At that time they would have been the ones that would authorize payment.

Id. at 169. He also admitted that "Suwalee and Chevy" would reimburse expenses. *Id*.

The Complainant submitted a bill for her hotel for the period June 2 to June 6, 2003 (Ex Z). It is assumed that this amount is part of the Complainant's request for itemized expenses.

A review of the facts shows that the Complainant justifiably relied on the Respondent that her trip was in part for business. The testimony shows that the Respondent had a policy of providing "fixed" traveling expenses on company business. The evidence shows that as of May 9, the Respondent provided the Prosecuting Party with indicia that she would be retained as an employee. RX 5, AX-23 and AX-24, Ex R and Ex S. The Respondent did not present any evidence to the contrary. The Respondent had reimbursed her for other expenses in the past. It is reasonable that the Complainant justifiably relied that she would have been reimbursed for these expenses on her return.

After a review of all of the expenses that are alleged in this category, I find that the Complainant is credible, and I accept that $353.76 in expenses are work related and that they reasonably flow as benefits relating to working conditions applied to all other employees.

I do not find the other expenses are proved, and therefore do not accept that they are viable.

Travel Expenses

In order to enter the United States and be granted H-1B status, a foreign employee must generally have an H-1B visa in his or her passport. H-1B visas, like most employment-related visas, are annotated with the sponsoring employer's name. Many times, the foreign employee will be queried upon arrival by an USCIS inspector about the employer and the nature of the employment. Problems often arise when an individual has filed a timely petition and begun work for a new employer pursuant to portability, but does not have, and is ineligible to receive, a new visa stamp properly annotated with his or her new employer. This can create confusion and suspicion upon inspection, which can result in the employee being held for further questioning, or even denied admission. The U.S. State Department has taken the position that an H-1B employee is admissible without a new visa, provided the alien meets the following requirements:

(1) The applicant is otherwise admissible;

(2) The applicant has a valid passport and visa (even if it is the original visa with the prior employer's name);

(3) The applicant has the prior form I-94 or a copy thereof or a form I-797 showing the original petition's validity dates; and

(4) The applicant has a dated filing receipt or other evidence that a new petition was filed in a timely fashion.

State Dept. Cable, Re: New H-1(B) Provisions (Feb. 14, 2001) (on file with the North Carolina Journal of International Law and Commercial Regulation).

An employee who has filed an H-1B petition pursuant to portability only should need to obtain a new visa abroad in the event that the original visa (i.e., the visa stamp naming the original employer) has expired. However, given increased scrutiny occasioned by September 11,

whether the USCIS will respect this State Department policy, especially in marginal cases or in areas requiring inspectors to exercise any positive discretion, is subject to considerable doubt.

Mr. Norris was directed by the Complainant to travel expenses she had paid to go to Thailand, from May 10, 2003 to June 2, 2003. *Id*. at 42. After his investigation, he determined that the travel expenses were not the Respondent's obligation. *Id*. at 42 - 43.

The Complainant testified that traveling expenses were recurrent with her employer. As I had stated with respect to incidental expenses above, she maintains that her "vacation," also had a business purpose. Tr., 89-90, 116-117. She carried a contract of sale for the company from Ft. Myers to Bangkok. *Id*. Normally, she would submit her receipts for traveling, but the company also had established "fixed traveling expenses" that include the taxi fee from airport to her home, from her home to the airport, and also from the Ft. Myers airport to the hotel. *Id*. at 116.

Mr. Matney admitted that the Complainant was in direct contact with the "owners" of the hotel as to repayment of expenses. *Id*. at 169.

The Respondent does not dispute that the Complainant personally paid the cost of her transportation. It argues that under H-1B regulations, 20 CFR § 655.731(c)(9), the expense is not an authorized deduction from the Complainant's compensation. According to 20 CFR § 655.731(c)(9)(iii)(B) & (C), if an offset or deduction from an employee's wages is to reimburse the employer for a business expense or is not for the principal benefit of the employee, such a deduction or offset would be improper and would constitute a violation.

Respondent argues that the trip was for end-of-employment travel and that there is no legal basis in the instant proceeding for the Complainant to be awarded her end-of-employment transportation expenses, citing to 20 CFR § 655.731(c)(9)(iii)(C).

The Administrator takes the position that an H-lB proceeding is not the proper forum in which to recoup these costs. It argues that under the regulations, the issue to be resolved is whether transportation expenses constitute "Authorized Deductions" from wages. 20 CFR § 655.731(c) (9). Any deduction from wages that constitutes the recoupment of an employer's business expense, or is not principally for the benefit of the employee, is not permitted. 20 CFR § 655.731(c) (9) (iii) (B) and (C). Subpart C of section 655.731(c) (9) (iii) provides that "initial transportation from, and end-of-employment travel to, the worker's home country shall not be considered a business expense." Because the regulations specifically exclude initial and return transportation as an employer's business expense, the Administrator concludes that the regulations provide no basis for the recoupment of those expenses by H-lB nonimmigrants.

However the record shows that the trip was not supposed to have been an initial or an end of term visit. The Complainant was terminated by Respondent on or around June 2, 2003. (AX-6; AX-25, AX-26). Both the LCA and the H-lB Visa under which the Complainant was working indicated that her employment with Respondent was expected to continue through November 28, 2004. (AX-2; AX-8; AX-9). Respondent, as the employer of Prosecuting Party, executed two 1-129 forms, which covered Complainant's employment from November 29, 1999 through November 28, 2002 (AX-12) and November 29, 2002 through November 28, 2004 (AX-8) respectively. Both forms contained the following statement, signed by Respondent's authorized representative:

> As an authorized official of the employer, I certify that the employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from the employment by the employer before the end of the period of authorized stay.

The record shows that Prosecuting Party paid the costs of her return transportation to Thailand in or around October, 2003. Ex L.

The Complainant testified that she was on vacation in Thailand, but that she was also to deliver certain company documents. RX 5, Ex R and Ex S, both dated May 9, are letters requesting another visa extension.

Based on the credibility of the witnesses, I accept that the Complainant was on a business errand at the time she was on "vacation". I accept that the Complainant was sent, in part, to deliver business documents relating to Respondent's business. I also find that Respondent knew or should have known that the Complainant was in transit when it issued the job termination letter.

The record shows that the Complainant paid $525.00 for a round trip flight in October, 2003. Ex L. However, the record does not reflect the cost of her trip in May, 2003. Therefore, her request for traveling expenses for that trip is denied.

Damages for Wrongful Termination

According to Mr. Norris, the Prosecuting Party's employment ended May 30, 2003. Tr., 44-46; AX 26; Ex G. This document is an Amtel Group of Florida memorandum, dated June 1, 2003 to Complainant from Respondent's Chairman, Chai, Thangsumphant. *Id*. At that time, the Prosecuting Party was in Thailand. *Id*. Mr. Norris testified that the Complainant does not contest the fact that her position was terminated. Tr. at 45. He also asserted that the Respondent was not required to provide compensation past the date of termination. *Id*. at 46.

The Complainant demands that she be compensated for "special" damages relating to the termination including damages for intentional infliction of emotional distress, for damage to her reputation and career prospects. *See* Ex II, Ex NN. She also requests that any "bad records" should be expunged, or have the Respondent issue a memo informing employees that a previous memo was improper.

The Administrator takes the position that there is no jurisdiction regarding this issue. Tr., 103.

The record shows that by May 9, 2003, the Complainant was provided documentation to put herself into a position to return to Ft. Myers to continue working for the Respondent. RX 5, Ex R, Ex S. The record shows that the Complainant's position was terminated while she was in transit from Bangkok to Ft. Myers.

The record shows that the Complainant was forcibly evicted. Ex AA. It shows that she was not provided advance notice of her eviction and was not provided any time or opportunity to comply with the notice of termination. It shows that the notice of eviction was posted in Respondent's establishment and was placed in a position to notify all of the Complainant's fellow employees that she was subject to termination and eviction.

Compensatory damages may be awarded under the environmental statutes for pain and suffering, mental anguish, embarrassment and humiliation caused by the discriminatory treatment. *See generally* ***DeFord v. Secretary of Labor***, 700 F.2d 281 (6th Cir. 1983), ***DeFord v. TVA***, 1990-ERA-60, (1992), ***Nolan v. AC Express***, 92-STA-37 (Sec'y 1/17/95) (analogous provision of the STA). The same should apply under the INA.

Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the proximate result of respondent's unlawful discriminatory conduct. *See* ***Bigham v. Guaranteed Overnight Delivery***, 1995-STA-37 (ALJ 5/8/96) (adopted by ARB 9/5/96). The Complainant bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. ***Blackburn v. Metric Constructors, Inc.***, 1986-ERA-4 (Sec'y

10/30/91); ***Bigham,*** *supra* at p. 14; ***Lederhaus v. Paschen***, 1991-ERA-13 (Sec'y 10/26/92), at p. 7 (Citation Omitted).

Although the Complainant made the allegation that she had been emotionally damaged, a review of the record does not show that she has proved that she was harmed as a result of compensible retaliation. She also failed to establish any damage. She did not provide any details about her mental state before and after the incident, did not allege any facts that would show that she was damaged in her reputation, and did not provide any evidence of a need for medical treatment.

Therefore, I find that the Complainant is not entitled to compensatory damages for emotional distress. ***DeFord v. TVA***, *supra*.

Blacklisting

The Complainant made an allegation that she was blacklisted. A blacklist is defined as a list of persons or organizations that have incurred disapproval or suspicion or are to be boycotted or otherwise penalized. Therefore, blacklisting is a form of reprisal. "Blacklisting" is marking an individual "for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." Black's Law Dictionary, 154 (5th Ed. 1979). "Blacklisting is the quintessential discrimination, i.e., distinguishing in the treatment of employees by marking them for avoidance." ***Leveille v. New York Air National Guard***, 94-TSC-3 and 4 (Sec'y Dec. 11, 1995, a Department of Labor whistleblower case).

Despite my ruling that the Complainant did not prove that she was a protected person for other discrimination claims, *supra*, if the Respondent acts to retaliate after she had filed the claim, there may be a conceivable blacklisting claim. The filing of the claim against the Respondent makes her a protected employee as of the date she filed.

However, the Complainant failed to show that she has been blacklisted. If she was marked for avoidance, it was not to any person or entity outside the company. I note that Mr. Matney testified that the Complainant should be considered to be in the same position as another employee who was also escorted from the premises, was charged with theft, and the Complainant has not been charged with any violation, to be an element of blacklisting.[40] However, the Complainant failed to show that she had lost any job or employment opportunity with any other entity other than Respondent. She alleged that she can not obtain documents from the company because she has been marked for avoidance, but she failed to make this claim in testimony and has not documented it in the record.

Special Damages

A complainant is generally entitled to recoupment of out of pocket expenses caused by retaliation. The Complainant provided a bill for room rent charged to her for the period June 2, 2003 to June 12, 2003, in the amount of $646.10. Ex Z.

I find that the room charges are not compensable as they are not fringe benefits that should have been contemplated by the LCAs.

Reinstatement

Reestablishment of the employment relationship is a usual component of the remedy in discrimination cases. ***McCuistion v. Tennessee Valley Authority***, Case No. 1989-ERA-6, Sec. Dec. and Ord., Nov. 13, 1991, slip op. at 23. In this case, it is apparent that the Complainant will

[40] Had this aspersion been made to third persons, such as potential employers, I would rule otherwise.

not return to status. The record shows that the Respondent failed to establish a valid basis for termination; and I also determined that there has not been any *bona fide* termination, as that term is defined by 20 CFR §655.731(c)(7)(ii). Therefore the Complainant is entitled to retain her position.

The record also shows that she was to have retained the position until November 28, 2004. (AX-2; AX-8; AX-9).

Front pay is a judicially created equitable remedy used as a substitute for reinstatement where there exists "irreparable animosity between the parties," ***Blum v. Witco Chem. Corp***., 829 F.2d 367, 374 (3d Cir. 1987), and "a productive and amicable working relationship would be impossible." ***EEOC v. Prudential Federal Sav. and Loan Ass'n***, 763 F.2d 1166, 1172 (10th Cir.), cert. denied, 474 U.S. 946 (1985). See ***United States v. Burke***, 119 L.Ed. 2d 34, 45 n.9 (1992) (acknowledging that some courts have ordered front pay for Title VII plaintiffs who were wrongfully discharged and for whom reinstatement was not feasible). Reinstatement is "the preferred remedy to cover the loss of future earnings." ***Feldman v. Philadelphia Housing Authority***, No. 93-1977, et al. (3d Cir. Dec. 22, 1994), 1994 U.S. App. LEXIS 36082. Front pay is used as a substitute when reinstatement is not possible for some reason. E.g., ***Michaud and Ass't Sec. v. BSP Transport, Inc.,*** ARB Case No. 97-113, ALJ Case No. 1995-STA-29, Fin. Dec. and Ord., Oct. 9, 1997, slip op. at 6, reversed on other grounds sub nom. ***BSP Trans, Inc. v. United States Dep't of Labor***, 160 F.3d 38 (1st Cir. 1998) (reinstatement not possible because of complainant's depression) ; ***Doyle v. Hydro Nuclear Svcs***., Case No. 1989-ERA-22, Sec. Fin. Dec. and Ord., slip op. at 7 (reinstatement not possible because of divestiture of business in which complainant had been employed). I find that the Complainant can not be reinstated because she is incompatible with current management and as she has already returned to Thailand, and the remainder of her term would be for too short a period to warrant reinstatement.

In some instances, front pay is used when the Complainant continues to work at the old job but receives an amount equivalent to the pay he would have earned but for the unlawful discrimination. ***James v. Stockham Valves & Fittings Co.***, 559 F.2d 310 (5th Cir.1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978).

Based on the fact that the reinstatement is impractical, and that there was no *bona fide* termination of employment, I find that the Complainant should receive front pay for the remainder of the term of the LCAs in question.

Equitable Remedies

The Prosecuting Party also requests that any “bad records” should be expunged, or have the Respondent issue a memo informing employees that a previous memo was improper.

Because I find that the Respondent did not render a *bona fide* termination, and that the documents she wishes to be expunged relate to that incident, I find that this is a reasonable request. Therefore, the Respondent shall notify, by certified mail, all employees of Respondent who were employed during the period that the termination and eviction were posted, notice that the Complainant’s position as vice president of Respondent was not properly terminated and that she should not have been evicted from Respondent premises.

Punitive Damages

Complainant requests that I grant punitive damages.[41] Punitive damages may be awarded under the environment statutes. *See e.g.*, 42 U.S.C. §7622(b)(2)(B) (CAA). Likewise, they are

[41] See letter dated February 23, 2004 addressed to Mr. Hament.

viable where there is intentional discrimination under Title VII. ***Kolstad v. Am. Dental Ass'n,*** 527 U.S. 526, 534, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). Therefore, I have jurisdiction to grant them under the INA.

Punitive damages are discretionary awards. Factors in determining whether punitive damages should be awarded and in what amount include:

1. The egregious nature of the conduct,
2. Its duration and frequency,
3. The defendant's response after being informed of the discrimination, and
4. The financial status of the defendant.

Id. In ***Kolstad***, the Supreme Court rejected the contention that punitive damages are available only in cases of an employer's "egregious" conduct. *Id*. at 534, 119 S.Ct. 2118. But it held that, to be liable for punitive damages, the employer "must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id*. at 536, 119 S.Ct. 2118.

In this case, I find that the Complainant has not established that Respondent was aware of the perceived risk. I do so because the Complainant has established that she had a better relationship with the prior regime, that of Chavalit Thangsumphant, who passed away during the tenure of the second LCA, than that of the current Chairman, Chai Thangsumphant.

I also have been provided no financial information.

Therefore, I find that punitive damages are not warranted in this case.

Interest

The INA does not specifically provide for interest, but the legislative intent refers a similar application to whistleblower legislation, which also does not have a specific reference to interest. The fact that such legislation does not expressly provide for interest does not preclude it. ***Blackburn v. Metric Constructors, Inc.***, 86-ERA-4 (Sec'y Oct. 30, 1991).

A. Prejudgment interest.

Under 20 CFR § 655.731(c)(11), any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and in the event of an investigation, will result in back wage assessment (plus civil money penalties and/or disqualification from H-1B and other immigration programs, if willful).

Back pay is awarded to make the claimant whole, and such relief 'can only be achieved if prejudgment interest is compounded.'" ***EEOC v. Kentucky State Police Dept***., 80 F.3d 1086, 1098 (6th Cir. 1996), quoting ***Sands v. Runyon***, 28 F.3d 1323, 1328 (2d Cir. 1994) and ***Saulpaugh v. Monroe Community Hosp***., 4 F.3d 134, 145 (2d Cir. 1993), cert. denied, 510 U.S. 1164 (1994). See also ***Doyle v. Hydro Nuclear Services***, ARB Nos. 1999-041, 99-042, and 00-012 ALJ No. 1989-ERA-22 (ARB May 17, 2000).

B. Postjudgment Interest

The usual interest rate employed on back pay awards under analogous whistleblower provisions is the interest rate for underpayment of federal taxes, set forth at 26 U.S.C. §6621(a)(2) (short-term Federal rate plus three percentage points). ***Doyle***, supra. See, e.g., ***Johnson v. Old Dominion Security***, ALJ Case Nos. 1986-CAA-3, -4, and -5, *Sec'y Final D&O*, May 29, 1991*, slip op*. at 32 6.

Penalties

Section 212(n)(2)(C) of the INA, 8 U.S.C. § 1182(n)(2)(C) sets forth certain penalties to protect employees. Given my findings above, penalties are not appropriate to this proceeding.

ORDER

Accordingly, in view of the foregoing, and upon the entire record, I issue the following Order:

1. Amtel of Florida (Respondent herein) shall immediately pay to Complainant five thousand two hundred eight dollars and sixty six cents ($5208.66) per month for the period of March 1, 2000 to the date of this Order. Respondent shall receive credit for any amounts paid to the Complainant for salary for that period of time. Respondent shall not receive any credit for in-kind payments made to Complainant for that period.

2. Respondent shall pay to Complainant five thousand two hundred eight dollars and sixty six cents ($5208.66) per month for the period from the date of this Order until November 28, 2004. Respondent shall not receive any credit for in-kind payments made to Complainant.

3. Respondent shall pay to Complainant ten thousand eight hundred twenty nine dollars and ninety-eight cents ($10,829.98) for reimbursement for rental paid for a period when Respondent was to have provided room rent in lieu of pay.

4. Respondent shall pay to Complainant an additional two weeks of vacation pay at the rate set forth in paragraph one above. Respondent shall receive credit for any amount that it may have paid pursuant to the Administrator's letter dated October 29, 2003 (AX-3).

5. Respondent shall pay to Complainant sixty eight dollars and fourteen cents ($68.14) for two pay periods when she was charged for health insurance coverage that she did not receive, which are compensable fringe benefits.

6. Complainant's request for $37,187.65 for work she performed for the Respondent on estate of Chavanuch Thangsumphant is **DENIED**. The request for reimbursement for "extra work" at a rate of $23.75 per hour is also **DENIED**.

7. Complainant's request for overtime pay is **DENIED**.

8. Respondent shall pay one hundred dollars ($100.00) per month for the period of employment, to June 2, 2003, for food and laundry expenses for violation of the prevailing working conditions sections of the law.

9. Complainant's request for travel expenses for her May, 2003 trip to and from Bangkok is **DENIED**.

10. Respondent shall pay the Complainant three hundred fifty three dollars and seventy six cents ($353.76) for unreimbursed expenses.

11. Complainant request for reimbursement for six hundred forty six dollars and ten cents ($646.10) for room rent is **DENIED** as not compensible.

12. Complainant's request for punitive damages is **DENIED**.

13. The Respondent shall pay compound interest on the back pay at the rate specified in 26 U.S.C. §6621.

14. The Respondent shall be assessed post judgment interest under 26 U.S.C. §6621(a)(2) until satisfaction.

15. Respondent shall notify, by certified mail, all employees of Respondent who were employed during the period that the termination and eviction were posted, notice that the Complainant's position as vice president of Respondent was not properly terminated and that she should not have been evicted from Respondent premises. Respondent shall also post a copy of the letter in a conspicuous place for a period of one year from the date of this order.

16. The Administrator shall make any computations it deems is necessary to effectuate this Order.

SO ORDERED.

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DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the